163-699

TRANSCRIPT OF RECORD.

163-699

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 203.

THE NORTHERN PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JEREMIAH SULLIVAN.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED DECEMBER 24, 1892.

(15,234.)

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a Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the September session, 1892, of the October term, 1891, of said court, begun and held at the United States court-house, in the city of St. Paul, Minnesota, on the third Monday in September, to wit, the nineteenth day of September, A. D. 1892, before the Honorable Walter H. Sanborn, circuit judge, and the Honorable Oliver P. Shiras, district judge.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Be it remembered that heretofore, to wit, on the ninth day of June, A. D. 1892, a transcript of record in pursuance of a writ of error directed to the circuit court of the United States for the district of Minnesota was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit; which said transcript is in the words and figures following, to wit:

1 United States of America to Jeremiah Sullivan, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the United States circuit court, dist. of Minnesota, fourth division, wherein The Northern Pacific Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable R. R. Nelson, judge of circuit court for the district of Minnesota aforesaid, this 11th day of April, A. D. 1892.

R. R. NELSON,
Judge of ——.

Indorsed: "Filed April 11, 1892. Oscar B. Hillis, clerk, by G. F. Hitchcock, Jr., deputy."

On the same day a copy of the above citation was filed herein, bearing the following indorsement: "Due service of a copy of the within citation is hereby admitted this — day of April, 1892. Chas. A. Ebert."

Know all men by these presents: that we, The Northern Pacific Railroad Company, by Tilden R. Selmes, its attorney, as principal, and The St. Paul Title Insurance & Trust Company, of Saint Paul, Ramsey county, Minnesota, as surety, are held and firmly bound unto Jeremiah Sullivan in the full and just sum of ten thousand dollars ($10,000), to be paid to the said Jeremiah Sullivan, his

heirs, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 11th day of April, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas, lately at the September, 1891, term of the circuit court of the United States, dist. of Minnesota, in a suit depending in said court between Jeremiah Sullivan, plaintiff, and The Northern Pacific Railroad Company, defendant, judgment was rendered against the said defendant, and the said defendant has obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Jeremiah Sullivan, citing and admonishing him to be and appear in the United States
2 circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation:

Now, the condition of the above obligation is such, that if the said defendant shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

NORTHERN PACIFIC RAILROAD COMPANY,
By TILDEN R. SELMES, *Its Attorney.*
[SEAL.] ST. PAUL TITLE INSURANCE & TRUST CO.,
Attest by MAURICE AUERBACH, *President.*
JAMES W. JONES, *Assistant Secretary.*

In presence of—
HENRY L. DAVIS.
C. R. WILKINSON.

Indorsed: "Filed April 11, 1892. Oscar B. Hillis, clerk."

On the same day a copy of the above bond was filed herein, bearing the following indorsement: "Due service of a copy of the within bond is hereby admitted this — day of April, 1892. Chas. A. Ebert, pl'ff's att'y."

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the circuit court of the United States, district of Minnesota, fourth division, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you at the September term, 1891, thereof, between Jeremiah Sullivan, plaintiff, and The Northern Pacific Railroad Company, defendant, a manifest error hath happened, to the great damage of the said Northern Pacific Railroad Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that

then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals, for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States court of appeals, for the eighth circuit, on or before the 11th day of *day of* June, 1892, to the end
3 that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

U. S. Circuit Court Seal, Dist. of Minnesota, Fourth Division.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 11th day *day* of April, in the year of our Lord one thousand eight hundred and ninety-two.

Issued at office in Minneapolis, with the seal of the United States circuit court and dated as aforesaid.

OSCAR B. HILLIS,
Clerk of United States Circuit Court for District of Minnesota.

Allowed by—
R. R. NELSON, *Judge.*

United States circuit court of appeals, eighth circuit. N. P. R. R. Company, plaintiff in error, *vs.* Jeremiah Sullivan. Writ of error. Jno. C. Bullitt, Jr., & Tilden R. Selmes, att'y- for plaintiff in error.

UNITED STATES OF AMERICA, *District of Minnesota, Fourth Division,* } *ss:*

In obedience to the command of the within writ, I herewith transmit to the United States circuit court of appeals a duly certified transcript of the record and proceedings in the within-entitled cause, with all things concerning the same.

U. S. Circuit Court Seal, Dist. of Minnesota, Fourth Division.

In witness whereof, I hereunto subscribe my name and affix the seal of the circuit court of the United States for the district of Minnesota, fourth division.

OSCAR B. HILLIS,
Clerk of the Circuit Court of the United States of America for District of Minnesota,
By G. F. HITCHCOCK, JR., *Deputy.*

UNITED STATES OF AMERICA:

JEREMIAH SULLIVAN, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Pleas before the honorable the judges of the circuit court of the United States of America for the district of Minnesota, of the
4 September term, A. D. 1891, of said court, held in the city of Minneapolis, in said district, in the year 1891.

STATE OF MINNESOTA, *ss:*

Be it remembered, that on this 23d day of March, A. D. 1891, came the defendant above named by Jno. C. Bullitt, Jr., and Tilden R. Selmes, its attorneys, and filed in the clerk's office of said court a transcript of proceedings had in the district court of Hennepin county, Minnesota, in words and figures as follows, to wit:

STATE OF MINNESOTA,
County of Hennepin, } *ss:*

Petition for Removal to United States Court.

District Court.

JEREMIAH SULLIVAN, Plaintiff,
against
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

To the honorable the court aforesaid:

The Northern Pacific Railroad Company, the defendant in the above-entitled action, respectfully shows *it* that it is a corporation organized and existing under the laws of the United States of America, to wit:

That certain act of Congress, approved July 2, A. D. 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound on the Pacific coast by the northern route," and the several subsequent acts and joint resolutions of Congress relating to the same subject-matter; that the above-entitled action has been commenced, and is yet pending in this court; that the date of the commencement of said action was February 14th, A. D. 1891; that the time to answer herein has not expired, and will not expire until March 7th, 1891, and the same has not yet been tried; that the amount in controversy in the said suit exceeds the sum of two thousand dollars ($2,000.00), exclusive of interest and costs, as will more fully appear by reference to the complaint therein; and that by reason of the premises the petitioner is entitled, under the acts of Congress for such cases made and provided, to remove the said suit into the circuit court of the United States for the district of Minnesota, fourth division, for the proceedings therein; and to that and herewith tenders to

this court proper and sufficient surety for the doing by it of the several things required by the said acts to be done upon the removal of a cause from a State court into a United States court.

Wherefore, your petitioner prays that the said surety may be accepted, and that this court proceed no further in the said cause, and that the same be transmitted to the circuit court of the United States for further proceedings therein.

Dated March 6th, A. D. 1891.

TILDEN R. SELMES,
Attorney for Petitioner.

STATE OF MINNESOTA, *Ramsey County,* } ss:

Personally came before me the undersigned, Tilden R. Selmes, attorney for the petitioner in the foregoing petition, and having been by me first duly sworn, did depose and say that the several allegations of the foregoing petition are true to the best of his knowledge, information and belief.

TILDEN R. SELMES.

Subscribed and sworn to before me, on the 6th day of March, A. D. 1891.

[NOTARIAL SEAL.]

EDWIN IRLE,
Notary Public, Ramsey County, Minn.

STATE OF MINNESOTA, *County of Hennepin,* } ss:

JEREMIAH SULLIVAN, Plaintiff,
against
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Bond on Removal to United States Court.

Know all men by these presents, that we, Newman Kline as principal and S. D. Mason and F. W. Wilsey as sureties of the Northern Pacific Railroad Company, are held and firmly bound unto Jeremiah Sullivan, the plaintiff in the above-entitled suit, in the penal sum of five hundred dollars, lawful money of the United States, for the payment of which, well and truly to be made, we hereby bind ourselves, and our executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated on the 6th day of March, A. D. 1891.

Whereas, the said Northern Pacific Railroad Company has filed its petition in the court aforesaid, praying for the removal into the circuit court of the United States for the district of Minnesota of the above-entitled suit, under and by virtue of the acts of Congress for such cases made and provided:

Now, therefore, if the said Northern Pacific Railroad Company

shall enter in the circuit court of the United States for the
6 district of Minnesota on the first day of its next session hereafter copy of the record in the said suit, and shall pay all costs that may be awarded by the said circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto; in such case, the above written obligation to be void, but otherwise to remain of full force and effect.

NEWMAN KLINE. [SEAL.]
S. D. MASON. [SEAL.]
F. W. WILSEY. [SEAL.]

Signed, sealed and delivered in presence of—
EDWIN IRLE.
TILDEN R. SELMES.

Personally came this day before the undersigned, a notary public in and for the said county, Newman Kline, S. D. Mason and F. W. Wilsey, the same persons who signed and sealed the foregoing instrument, and they acknowledged that they executed the same as their free act and deed.

Dated March 6th, A. D. 1891.

[NOTARIAL SEAL.] EDWIN IRLE,
Notary Public, Ramsey County, Minn.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Personally came before the undersigned S. D. Mason and F. W. Wilsey, the same persons who signed and sealed the foregoing instrument, and each having been first duly sworn, did depose and say that he is a resident and freeholder of this State and worth the sum of five hundred dollars above debts, liabilities and property exempt from levy and sale under execution.

S. D. MASON.
F. W. WILSEY.

Subscribed and sworn to before me on the 6th day of March, 1891.

[NOTARIAL SEAL.] EDWIN IRLE,
Notary Public, Ramsey County, Minn.

District Court, 4th Judicial District.

STATE OF MINNESOTA, } ss:
County of Hennepin, }

I, C. B. Tirrell, clerk of the above-named court, do hereby certify that I have compared the papers-writing, to which this certificate is attached with the original petition for removal to U. S. court, and bond for removal to U. S. court, in the action therein entitled,
7 as the same appears of record and on file in the said clerk's office, at the court-house in said Hennepin county, Minne-

sota, and find the same to be a true and correct copy thereof and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at the city of Minneapolis, this 9th [SEAL.] day of March, A. D. 1891.

C. B. TIRRELL, *Clerk*,
By H. E. JOHNSON, *Deputy*.

Indorsed: "Filed Mar. 23, 1891. Oscar B. Hillis, clerk, by C. C. Webster, deputy."

And on the 2d day of September, 1891, the following summons and complaint were filed of record in said cause, to wit:

STATE OF MINNESOTA, }
County of Hennepin. }

Complaint.

District Court, 4th Judicial District.

JEREMIAH SULLIVAN, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant. }

Plaintiff for cause of action alleges and states:

1. That on the 10th day of November, A. D. 1889, defendant had been, and ever since has been, a corporation created by and existing under an act of Congress, and as such was then, and still is the owner and in possession and control of a certain railroad track which runs from St. Paul in a northwesterly direction through the northeastern part of the city of Minneapolis, intersecting in a very sharp angle — Monroe street, which street was and is one of the principal thoroughfares in said city of Minneapolis and in constant use by the public, as defendant then and there well knew.

—. That at and during the time hereinbefore mentioned there was a valid city ordinance of the city of Minneapolis in force entitled "An ordinance prohibiting the whistling of locomotive engines within the limits of the city of Minneapolis, approved February 15th, 1883," providing that no persons shall within the limits of said city sound or cause to be blown the steam whistle of a locomotive engine.

3. That on the day first above mentioned, the same being Sunday, one of defendant's freight trains attached to one of defendant's locomotive engines, facing eastward, had come on the said track of defendant to a stop a short distance northwest from where said
8 defendant's said track crosses the aforesaid Monroe street, while then and there a large funeral procession, which plaintiff with his aged mother had joined, both then and there riding in a buggy drawn by one horse driven by plaintiff, was lawfully proceeding along the said Monroe street from south to north, and upon the assurance of the defendant's flagman then stationed at said crossing, that said crossing was at that time safe for travelers to

pass, and there appearing nothing to the contrary, the said funeral procession and this plaintiff with it commenced to cross the said railroad track of defendant.

4. That when plaintiff had with his horse and buggy safely crossed the said track and was just about to proceed further on, there being then about 10 carriages ahead of him and about the same number closely following him, he, exercising all the time reasonable care and foresight; defendant's servants then in charge of said locomotive engine then and there standing very close to the aforesaid public street and to the point plaintiff's horse had to pass and was in the act of passing, suddenly and wantonly opened the cylinder cocks of the said locomotive engine and negligently and with unnecessary violence blew off the steam, and at the same time negligently, recklessly and unlawfully, they being then within the limits of the city of Minneapolis, caused the whistle of the said locomotive to be furiously blown off with a frightful noise in violation of that certain city ordinance hereinbefore referred to, there being at the time no imminent and immediate danger to life or property, nor was said whistle sounded as a warning of danger.

5. That the said sudden and unnatural noise thus made by the unlawful and unnecessarily blowing and sounding the whistle of the said locomotive, and the aforesaid wanton and reckless exhausting and blowing off of steam as above alleged did then and there violently frighten said horse of plaintiff and cause the same to become unmanageable and to get beyond the control of said plaintiff, throwing plaintiff and his mother over the dash-board of said buggy and hurling him violently and with great force into a ditch and upon the ground alongside of said Monroe street, and the said horse then and there kicked him on his head, shoulder and side and caused the wheels of said buggy to pass over the upper part of his body, in consequence whereof he was severely bruised and wounded about the head, neck and shoulders and the chest, causing the lateral side of said chest to cave in somewhat so as to seriously injure his right lung and interfere greatly with his taking breath, also paralyzing his right arm so as to make the same entirely useless and causing serious injury to his spinal cord and his nervous system in general, all solely by reason of the negligence of said defendant's servants in managing and operating the said locomotive engine in the improper and careless manner hereinbefore stated, and not by reason of any negligence or carelessness of plaintiff himself.

9 Plaintiff further shows to the court that up to the time he was injured in the manner aforesaid he was able to earn and actually did earn $75.00 per month; and that ever since said injuries, and by reason thereof, has been unable to attend to his regular business as a switchman, or to do any manual work whatever, to his damage in the sum of $1,000.00; also that plaintiff is now 32 years old and that he has been informed and that he verily believes it to be a fact that said personal injuries, which he has sustained solely by the negligence of defendant, are of a permanent character, that he will be subject to continual and increasing bodily

pain, and that he will never be able to do any work whatever solely from and in consequence of said injuries, all to his damage in the further sum of $15,000.00.

Wherefore, plaintiff demands judgment against said defendant for the sum of $16,000.00, together with the costs and disbursements of this action.

CHAS. A. EBERT AND
HENRY EBERT,
Attorneys for Plaintiff.

STATE OF MINNESOTA, } ss:
County of Hennepin, }

Jeremiah Sullivan, being first duly sworn, upon oath says that he is the plaintiff in the foregoing within-entitled action; that the foregoing complaint is true of his own knowledge except as to matters therein stated on information and belief and as to such matters he believes it to be true.

JERRY SULLIVAN.

Subscribed and sworn to before me this 8th day of February, 1891.

[NOTARIAL SEAL.] HENRY EBERT,
Notary Public, Hennepin Co., Minnesota.

STATE OF MINNESOTA, }
County of Hennepin. }

Summons.

District Court, 4th Judicial District.

JEREMIAH SULLIVAN, Plaintiff,
against
THE NORTHERN PACIFIC RAILWAY COMPANY, Defendant.

The State of Minnesota to the above-named defendant:

You are hereby summoned and required to answer the complaint of the plaintiff in the above-entitled action, which complaint is hereto annexed and herewith served upon you, and to serve a copy of your answer to said complaint on the subscribers at their office in the city of Minneapolis in the said county of Hennepin, within 20 days after service of this summons upon you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will have the amount plaintiff is entitled to recover ascertained by the court, or under its direction, and take judgment for the amount so ascertained, together with the costs and disbursements of this action.

Dated —— —, A. D. 189–.

C. A. & H. EBERT,
Attorneys for Plaintiff.

And on the 7th day of March, 1891, the following answer was filed of record herein, to wit:

Answer.

United States Circuit Court, District of Minnesota, Fourth Division.

JEREMIAH SULLIVAN, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Defendant, answering the complaint of the plaintiff herein, admits that it is a corporation organized and existing under the laws of the United States and engaged in the operation of a railroad substantially as alleged in said complaint. Further answering in this behalf defendant denies each and every allegation in said complaint contained and every part thereof, except as hereinbefore expressly admitted, qualified or denied, and specifically denies that by reason of any of the matters or things in said complaint mentioned plaintiff has been damaged in the sum of sixteen thousand ($16,000.00) dollars, or any other sum whatsoever.

Wherefore defendant prays that it may be hence dismissed and for its costs and disbursements herein.

Dated March 6th, 1891.

JNO. C. BULLITT, JR., &
TILDEN R. SELMES,
Defendant's Att'ys, St. Paul, Minnesota.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Tilden R. Selmes came before me personally, and being duly sworn, doth say that he is an officer, to wit, assistant counsel of defendant in the above-entitled action; that the foregoing answer is true of his own knowledge, except as to those matters
11 therein stated on his information and belief, and as to those matters that he believes it to be true.

TILDEN R. SELMES.

Subscribed and sworn to before me this 6th day of March, A. D. 1891.

[SEAL.]

EDWIN IRLE,
Notary Public, Ramsey County, Minnesota.

Indorsed: "Filed March 7, 1891. Oscar B. Hillis, clerk, by C. C. Webster, deputy."

And on the 4th day of September, 1891, the following proceeding of court was entered of record in said cause, viz:

United States Circuit Court, District of Minnesota, Fourth Division.

Term Minutes, September Term, A. D. 1891.

FRIDAY MORNING, *September* 4, 1891.

Court opened pursuant to adjournment.

Present: Hon. Henry C. Caldwell, circuit judge; Hon. R. R. Nelson, district judge.

JEREMIAH SULLIVAN
vs.
NORTHERN PACIFIC RAILROAD CO.

Before Judge Caldwell.

This cause being regularly called for trial, the plaintiff appears by his attorney, Charles A. Ebert, and the defendant by its attorneys, Tilden R. Selmes and C. D. O'Brien.

Thereupon it is ordered that a jury come, to wit: Frank Sellen, John C. McLaughlin, O. L. Cutter, Nick Hennen, Geo. Starkweather, Frank McNerney, J. H. Lieten, O. N. Grue, F. V. Burdorf, M. O. Elton, O. O. Nobin, John Oakes, twelve good and lawful men, who were duly sworn to try said cause, and the trial therefore is proceeded with as follows:

Charles A. Ebert opens the case for plaintiff.

Jeremiah Sullivan is sworn and examined in his own behalf.

Mrs. Jeremiah Sullivan is sworn and examined for plaintiff.

Dr. L. N. Sharp is sworn and examined for plaintiff.

Dr. A. J. Golden is sworn and examined for plaintiff.

Sylvanus J. Bryant " " " " " "
Oscar Anderson " " " " " "
R. J. Cheney " " " " " "
Jacob Peterson " " " " " "
Nels. Johnson " " " " " "
Adolph Schilling " " " " " "
Henry Ebert " " " " " "

12 And here the plaintiff rests his case, and the trial of said cause not being concluded at the hour of adjournment, it is by the court—

Ordered that further proceedings therein be and the same are hereby postponed until tomorrow morning.

Ordered that this court do now adjourn till tomorrow morning at 10 o'clock.

HENRY C. CALDWELL,
Circuit Judge.

And on the 5th day of September, 1891, the following proceeding of court was entered of record in said cause, to wit:

United States Circuit Court, District of Minnesota, Fourth Division.

Term Minutes, September Term, A. D. 1891.

SEPTEMBER 5, 1891—Saturday morning.

Court opened pursuant to adjournment.

Present: Hon. Henry C. Caldwell, circuit judge; Hon. R. R. Nelson, district judge.

JEREMIAH SULLIVAN
vs.
NORTHERN PACIFIC RAILROAD CO.

This day again come the parties herein by their respective attorneys, also the jury sworn to try this cause, and the further trial of the same is proceeded with as follows:

C. D. O'Brien opens the case for defendant.

Peter Houle is sworn and examined as a witness for defendant.

Andrew Gretsen is sworn and examined as a witness for defendant.

U. S. Davis is sworn and examined as a witness for defendant.

John Horen is sworn and examined as a witness for defendant.

Dr. W. A. Jones is sworn and examined as a witness for defendant.

A. H. Akan is sworn and examined as a witness for defendant.

W. A. Marks is sworn and examined as a witness for defendant.

Dr. F. A. Dunsmore is sworn and examined as a witness for defendant.

13 E. J. Abbott is sworn and examined as a witness for defendant.

D. D. Kelleher is sworn and examined as a witness for defendant.

Thereupon defendant rests its case.

Dr. L. N. Sharp is recalled and further examined in rebuttal.

The plaintiff here rests its case.

And the trial of said cause not being concluded at the hour of adjournment, it is by the court—

Ordered that further proceedings herein be and the same hereby are postponed until Monday morning next.

Ordered that this court do now adjourn till ten o'clock Monday morning next.

HENRY C. CALDWELL,
Circuit Judge.

And on the 7th day of September, 1891, the following proceeding of court was entered of record herein, to wit:

United States Circuit Court, District of Minnesota, Fourth Division.

Term Minutes, September Term, A. D. 1891.

SEPTEMBER 7TH, 1891.

JEREMIAH SULLIVAN
vs.
NORTHERN PACIFIC RAILROAD COMPANY.

Before Judge Caldwell.

This day again come the parties herein by their respective attorneys, also the jury sworn to try this cause, and the further trial of the same is proceeded with as follows:

C. D. O'Brien sums up the case for defendant.

C. A. Ebert sums up the case for the plaintiff.

The court instructs the jury.

Albert W. Russell is sworn to take charge of the jury, and they retire to consider of their verdict. After due consideration concerning the same and being fully advised in the premises they find and return into court by their foreman their verdict, to wit:

"We, the jury, find for the plaintiff, and assess the damages at four thousand and five hundred dollars ($4,500.)

O. N. GRUE, *Foreman.*"

14 It is therefore considered, ordered and adjudged by the court that the plaintiff, Jeremiah Sullivan, do have and recover of and from the defendant, The Northern Pacific Railroad Company, the aforesaid sum of forty-five hundred dollars ($4,500), so found to be due by the jury, together with his costs and disbursements of this action to be taxed and that he have execution therefor.

Upon motion of C. D. O'Brien, attorney for defendant, it is further ordered by the court that execution upon the above judgment be and the same hereby is stayed for the period of forty-two days from and after this date.

The following requests for instructions to the jury were handed up by the counsel for the respective parties on the trial hereof, and filed of record herein on the 7th day of September, 1891, to wit:

STATE OF MINNESOTA:

United States Circuit Court.

JEREMIAH SULLIVAN, Plaintiff,
vs.
NORTHERN PACIFIC R. R. Co., Defendant.

Instructions Requested on Behalf of Plaintiff.

I.

If the jury find that the defendant's servants, then in charge of its locomotive engine, caused the whistle of said engine to be blown

as alleged, in open violation of the city ordinance prohibiting the blowing of such whistle within the city limits, then such blowing of the whistle is evidence of negligence on the part of defendant, unless you find and are satisfied that there was immediate and impending danger to property or life, justifying the said blowing of the whistle.

II.

As to the testimony of the medical experts given in behalf of the respective parties to this action, the court instructs you that the testimony of neither of said physicians is conclusive as to the question or questions upon which it was given, but stands substantially on the same footing as the testimony of any other witnesses in this case, and its weight and credibility is solely to be determined by the jury in the light of all the facts and circumstances of the case.

CHAS. A. EBERT,
Plaintiff's Att'y.

Indorsed: "Filed Sept. 7, 1891. Oscar B. Hillis, clerk, by C. C. Webster, deputy."

15 *Requests for the Defendant.*

1. The court instructs the jury to bring in a verdict for the defendant.

2. If the jury believe from the evidence that it was necessary and customary in the proper operation of the defendant's railroad, having due regard to the safety of the public, to blow the whistle of the engine at all the time or times you may find it was blown, then in that case your verdict must be for the defendant, and it makes no difference whether plaintiff's horse was frightened by the whistling of said locomotive or not.

Indorsed: "Filed Sept. 7, 1891. Oscar B. Hillis, clerk, by C. C. Webster, deputy."

And on the 5th day of April, 1892, the following stipulation was filed of record herein, to wit:

Stipulation.

United States Circuit Court, District of Minnesota, Fourth Division.

JEREMIAH SULLIVAN, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

It is hereby stipulated by and between the parties hereto that the stay in the above-entitled action be and the same is hereby extended until April 11th, inclusive, 1892, within which time to perfect the

appeal to the United States circuit court of appeals for the eighth circuit.

Dated April 5th, 1892.

C. A. EBERT AND
H. EBERT,
Attorneys for Plaintiff.
TILDEN R. SELMES,
Attorney for Defendant.

Indorsed: "Filed April 5th, 1892. Oscar B. Hillis, clerk, by G. F. Hitchcock, Jr., deputy."

And on the 11th day of April, 1892, the following assignment of errors was filed of record herein, viz:

Assignments of Error.

United States Circuit Court, District of Minnesota, Fourth Division.

JEREMIAH SULLIVAN, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

And now comes the above-named defendant by John C. Bullitt, Jr., and Tilden R. Selmes, its attorneys, and says that in the
16 record and proceedings in said court in the above-entitled action and also in giving judgment in said action, there is manifest error in this:

1. The court erred in overruling the objection made by the counsel for defendant to the introduction of the following ordinance:

"An ordinance prohibiting the whistling of locomotive engines within the limits of the city of Minneapolis.

The city council of the city of Minneapolis do ordain as follows:

SEC. 1. That no person or persons shall sound or cause to be sounded, blow or cause to be blown any whistle of any locomotive engine within the limits of the city of Minneapolis.

SEC. 2. Competent evidence of the fact of the sounding or blowing of such whistle shall be *prima facie* proof that the engineer who at the time had charge of the engine committed the act; provided, that if, upon the trial of this offense the person accused shall prove in his defense by competent evidence, that at the time the act was done there was imminent and immediate danger to life or property and the whistle was sounded as a warning of such danger, he shall not be held guilty.

SEC. 3. Any person or persons offending against or violating any of the provisions of this ordinance shall be punished, on conviction, by a fine of not less than five dollars nor more than one hundred dollars, or by imprisonment of not less than five or more than thirty days, or both, in the discretion of the municipal court.

SEC. 4. This ordinance shall take effect and be in force from and after its publication."

The introduction of said ordinance was objected to on the part of the defendant as immaterial, incompetent and irrelevant, on the ground that it is not in the power of the city authorities to pass such an ordinance; that the same is unreasonable and also class legislation, as it does not apply to any other whistles save those of locomotives; which objection was overruled, and defendant duly excepted.

II. The court erred in instructing the jury as follows:

"I instruct you that if you find from the evidence that the defendant's engineer, at the time and place mentioned, and within the corporate limits of the city of Minneapolis, blew a loud blast or blasts of the locomotive whistle, and that at the time the act was done there was no imminent or immediate danger to life or property, and the whistle was not sounded as a warning of such danger, then the blowing of the whistle was a negligent act." To the giving of which portion of the charge defendant duly excepted.

17 III. The court erred in refusing to charge the jury as requested by the defendant, as follows:

"The court instructs the jury to bring in a verdict for the defendant." To which refusal to charge as requested, defendant duly excepted.

IV. The court erred in refusing to instruct the jury, as requested by the defendant, as follows:

"If the jury believe from the evidence that it was necessary and customary in the proper operation of defendant's road, having due regard to the safety of the public, to blow the whistle of the engine at all the time or times you may find it was blown, then in that case your verdict must be for the defendant, and it makes no difference whether plaintiff's horse was frightened by the whistling of said locomotive or not." To which refusal to charge as requested, defendant duly excepted.

And the said defendant prays that the judgment aforesaid rendered against it in this action for the errors aforesaid, and the other and many manifest errors in the said record and proceedings aforesaid, may be reversed, canceled and altogether held for nothing, and that it may be restored in all things which it has lost by occasion of said judgment.

JNO. C. BULLITT, JR., &
TILDEN R. SELMES,
Attorneys for Defendant.

Indorsed: "Filed Apr. 11, 1892. Oscar B. Hillis, clerk."

And on the 1st day of April, 1892, the following bill of exceptions was filed of record herein, viz:

Bill of Exceptions.

United States Circuit Court, District of Minnesota, Fourth Division.

JEREMIAH SULLIVAN, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

This action was tried before Hon. Henry C. Caldwell, judge of the United States circuit court for the eighth district, and a jury at the regular term of the United States circuit court for the district of Minnesota, held at Minneapolis, Minnesota, on the 4th day of September, A. D. 1891, and the days following.

Charles A. Ebert appeared for the plaintiff and Tilden R. Selmes and C. D. O'Brien for the defendant.

18 The plaintiff, to maintain and prove his case, offered in evidence an ordinance of the city of Minneapolis, duly approved February 12th, 1883, and found on page 583 of the Book of Ordinances of the City of Minneapolis, and which is as follows:

"An ordinance prohibiting the whistling of locomotive engines within the limits of the city of Minneapolis.

The city council of the city of Minneapolis do ordain as follows:

SEC. 1. That no person or persons shall sound or cause to be sounded, blown or cause to be blown, any whistle of any locomotive engine within the limits of the city of Minneapolis.

SEC. 2. Competent evidence of the fact of the sounding or blowing of such whistle shall be *prima facie* proof that the engineer who at the time had charge of the engine committed the act; provided, that if upon the trial of this offense the person accused shall prove in his defense by competent evidence, that at the time the act was done that there was imminent and immediate danger to life or property, and that the whistle was sounded as a warning of such danger, he shall be held not guilty.

SEC. 3. Any person or persons offending against, or violating any of the provisions of this ordinance, shall be punished on conviction by a fine of not less than five dollars, nor more than one hundred dollars, or by imprisonment of not less than five or more than thirty days, or both, in the discretion of the municipal court.

SEC. 4. This ordinance shall take effect and be in force from and after its publication."

The introduction of said ordinance was objected — on the part of the defendant as immaterial, incompetent and irrelevant on the ground that it is not in the power of the city authorities to pass such an ordinance; that the same is unreasonable and also class legislation, as it does not apply to any other whistles save those of locomotives. Which objection the court overruled and the defendant excepted.

The plaintiff thereupon introduced evidence tending to show that

Jeremiah Sullivan, the plaintiff, was 34 years of age and resided in the city of Minneapolis, Minnesota; that he was a switchman by occupation, and on the 10th day of November, A. D. 1889, attended a funeral in said city between three and four o'clock in the afternoon of that day; that said funeral started from Cedar avenue in South Minneapolis to go to Sandy Lake Catholic cemetery in Northeast Minneapolis; that the customary and regular route from said Cedar avenue to said cemetery was by what is known as Monroe street, which runs in a northeasterly direction toward the cemetery; that said Monroe street crosses the track of the Great North-
19 ern railroad and the track of the defendant at what is known as Monroe-street crossing at an angle, the said tracks being parallel to each other and running north and south, the Northern Pacific Railroad Company having the easterly track and the Great Northern railroad westerly track; that what is known as the Mulberry track, belonging to the defendant, runs east and west and crosses said first-mentioned tracks at right angles at a point about two or three hundred feet north of where Monroe street crosses them; that the plaintiff on said 10th day of November, 1889, was in a top buggy driving a single horse and was in about the middle of the funeral procession, which consisted of about 40 carriages or buggies; that when plaintiff approached the crossing there was a locomotive engine of defendant pulling a train of 20 or 25 cars on defendant's track north of said Monroe street and headed south, the engine being about 35 to 50 feet from said street crossing; that the engine was standing still; that after the plaintiff had crossed said defendant's track, but while he was within a few feet of the track the engine whistled, giving two short blasts of the whistle, allowing the steam from the cylinder cocks to escape at the same time, and then pulled over the crossing with the train. The plaintiff further introduced evidence tending to show that said whistles of defendant's locomotive frightened the plaintiff's horse and caused him to run away, running into a telegraph pole standing near the crossing and throwing the plaintiff over the dashboard, causing two wheels of plaintiff's buggy to run over plaintiff's side, the horse's hoof scraping his head a little. Plaintiff introduced evidence further tending to show that there was no obstruction or anything on the track which called for the blowing of the whistle or the opening of the cylinder cocks. Plaintiff introduced further evidence tending to show that there was a flagman stationed at the crossing whose duty it was to stop all persons attempting to cross the track when a train was approaching, but who had no authority to stop a train. Plaintiff introduced evidence further tending to show that it was not customary or necessary in the proper operation of the company's road, having due regard to the safety of the public to blow the whistle at the time or times plaintiff's evidence tended to show it did, and that it was unnecessary to blow it at the time the plaintiff was injured, and that the usual practice was to stop, and ring the bell when starting, and that the whistle was never blown at such times; that there was a flagman at the crossing whose duty it was to unfurl his flag on the approach of trains and

thus stop persons from approaching the crossing until he signaled them to come on. Plaintiff introduced further evidence tending to show that the injuries plaintiff received in said accident were of a permanent character; that they rendered him incapable of pursuing his occupation as a switchman; had caused a partial paralysis of his right arm and had permanently injured his nervous system; that he had been earning from $70 to $80 per month prior to the accident, and that he was incapacitated by reason of said injuries from doing any regular work.

20 The defendant to support the issues on its part introduced its flagman as a witness, who testified among other things as follows:

I was sitting in the flag shanty, and I seen a train coming, a freight train, and I saw the funeral coming; the funeral was not very far from the crossing, so my calculation was that the funeral would go across before the train came down, because by the time the funeral was close to the track the train was blowing for the railroad crossing; it was going across the river, so I let them go.

Q. Let whom go?

A. Let the funeral go, because I didn't want to stop the funeral for the train; the engineer stopped for the crossing, as his order was, and sounded his whistle for brakes off; he started, and when he seen the funeral he stopped, and he stopped there until the funeral was passed, as the last buggy was 60 or 75 feet from the crossing; he stopped first and then he started again and then he waited until the funeral was passed and they went over the crossing——

Q. From what crossing?

A. From the crossing of the Great Northern; then the engineer started; when the engineer started I see quick that the horse was off and he runs against the post; I didn't see any more of it at the time, but when the train passed I went there; a man came and asked me for a bucket, and I gave him a bucket of water, and I went up there to see what was the matter, and I see it.

Q. Was there anybody hurt except the lady?

A. I didn't see any more, but I couldn't stop, because it was not my place to go up there, a block away from my place where I was put.

Q. When you saw the train, how far was that train north of the crossing?

A. At the time I saw the train first?

Q. Yes.

A. It would be—well, over half a mile.

Q. Where was the funeral when you first saw it?

A. Well, I generally open my eyes pretty sharp, because my eyes is poor; I see them long before they came near me, five blocks about.

Q. You thought the funeral would pass before the train would get there?

A. Yes, sir.

Jeremiah Sullivan, the plaintiff, was 34 years of age and resided in the city of Minneapolis, Minnesota; that he was a switchman by occupation, and on the 10th day of November, A. D. 1889, attended a funeral in said city between three and four o'clock in the afternoon of that day; that said funeral started from Cedar avenue in South Minneapolis to go to Sandy Lake Catholic cemetery in Northeast Minneapolis; that the customary and regular route from said Cedar avenue to said cemetery was by what is known as Monroe street, which runs in a northeasterly direction toward the cemetery;

19 that said Monroe street crosses the track of the Great Northern railroad and the track of the defendant at what is known as Monroe-street crossing at an angle, the said tracks being parallel to each other and running north and south, the Northern Pacific Railroad Company having the easterly track and the Great Northern railroad westerly track; that what is known as the Mulberry track, belonging to the defendant, runs east and west and crosses said first-mentioned tracks at right angles at a point about two or three hundred feet north of where Monroe street crosses them; that the plaintiff on said 10th day of November, 1889, was in a top buggy driving a single horse and was in about the middle of the funeral procession, which consisted of about 40 carriages or buggies; that when plaintiff approached the crossing there was a locomotive engine of defendant pulling a train of 20 or 25 cars on defendant's track north of said Monroe street and headed south, the engine being about 35 to 50 feet from said street crossing; that the engine was standing still; that after the plaintiff had crossed said defendant's track, but while he was within a few feet of the track the engine whistled, giving two short blasts of the whistle, allowing the steam from the cylinder cocks to escape at the same time, and then pulled over the crossing with the train. The plaintiff further introduced evidence tending to show that said whistles of defendant's locomotive frightened the plaintiff's horse and caused him to run away, running into a telegraph pole standing near the crossing and throwing the plaintiff over the dashboard, causing two wheels of plaintiff's buggy to run over plaintiff's side, the horse's hoof scraping his head a little. Plaintiff introduced evidence further tending to show that there was no obstruction or anything on the track which called for the blowing of the whistle or the opening of the cylinder cocks. Plaintiff introduced further evidence tending to show that there was a flagman stationed at the crossing whose duty it was to stop all persons attempting to cross the track when a train was approaching, but who had no authority to stop a train. Plaintiff introduced evidence further tending to show that it was not customary or necessary in the proper operation of the company's road, having due regard to the safety of the public to blow the whistle at the time or times plaintiff's evidence tended to show it did, and that it was unnecessary to blow it at the time the plaintiff was injured, and that the usual practice was to stop, and ring the bell when starting, and that the whistle was never blown at such times; that there was a flagman at the crossing whose duty it was to unfurl his flag on the approach of trains and

thus stop persons from approaching the crossing until he signaled them to come on. Plaintiff introduced further evidence tending to show that the injuries plaintiff received in said accident were of a permanent character; that they rendered him incapable of pursuing his occupation as a switchman; had caused a partial paralysis of his right arm and had permanently injured his nervous system; that he had been earning from $70 to $80 per month prior to the accident, and that he was incapacitated by reason of said injuries from doing any regular work.

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Q. From what crossing?

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Q. Was there anybody hurt except the lady?

A. I didn't see any more, but I couldn't stop, because it was not my place to go up there, a block away from my place where I was put.

Q. When you saw the train, how far was that train north of the crossing?

A. At the time I saw the train first?

Q. Yes.

A. It would be—well, over half a mile.

Q. Where was the funeral when you first saw it?

A. Well, I generally open my eyes pretty sharp, because my eyes is poor; I see them long before they came near me, five blocks about.

Q. You thought the funeral would pass before the train would get there?

A. Yes, sir.

Q. Therefore, you did not stop the funeral?

A. No, sir.

Q. If you had thought that the train would get there before the funeral you would have stopped the funeral?

A. Certainly.

Q. You have no orders to stop trains?

A. I have no right to stop anybody where there is a good opportunity to cross, unless it is to avoid an accident.

21 Q. Did you see that engine come to the railroad crossing and whistle and start?

A. Before it approached the railroad crossing it stopped, and then whistled brakes off.

Q. Do they always do that, whistle brakes off?

A. They don't always, but they most always do.

Q. They should do it?

A. Yes, sir.

Q. Where was the funeral when the engine whistled brakes off?

A. It whistled brakes off when part was over and part was not. The trouble is the man didn't know there was a funeral at first, but he saw it, and then stopped again.

Q. Where was his engine when he stopped the second time?

A. His engine was exactly a hundred and forty feet from the *the* crossing.

Q. You say exactly?

A. Yes, sir; exactly.

Q. Why do you say exactly?

A. Because I know just the very spot where it stopped, and I measured it out.

Q. Did you give him any signal to stop?

A. I have no right to.

Q. Did you do it?

A. I have no right to stop anything except for danger.

Q. What did you do with your flag when you saw the engine coming—the train coming?

A. I held the flag in my hand.

Q. Did you use it?

A. I had no right to; there was no danger; the road was clear.

Q. You say the engine stopped one hundred and forty feet north of that crossing?

A. Yes, sir; a hundred and forty feet from the crossing.

Q. All the funeral went over?

A. Yes, sir.

Q. Are you sure of that?

A. Yes, sir.

Q. This man that brings this suit says that only a little over half the funeral had got over.

A. Well, my eyes never lie for me, and I see the funeral over at that time the train went over. There was three buggies back there, way by the lumber factory; that would be about four hundred feet. I don't know whether they belonged to the funeral or not; I can't swear to it. That was all I saw, except some wood carts.

Q. Some other men came here and said that that train cut the funeral procession in two. Is that true?

A. No, sir.

Q. What do you say about that?

22 A. I say exactly as I testify now; there were none but these three buggies, if they belonged to the funeral.

Q. Is there any truth in the statement of this man when he says that this funeral procession was going right along and it was cut in two by the train?

A. No, sir.

The COURT: Did that train make two stops?

WITNESS: Yes, sir.

Q. Where did it stop the first time and what signal did it give then when it stopped the first time, and why did it stop; why did it stop the first time and why did it stop the second time?

A. Well, the first time it stopped——

Q. Show on the paper the place where that train stopped the first time.

A. The first time it was just three hundred feet from the crossing.

Q. What did it do?

A. It stopped there, and then it sounded the whistle for brakes off.

Q. Did it whistle before it stopped the first time?

A. No, sir.

Q. Did it whistle up there for the crossing?

A. No, sir.

Q. Did it come to a stop without any whistle?

A. Yes, sir; it came to a stop without any whistle. At the time it crossed the railroad crossing it stopped without any whistle.

Q. When the train was coming down here, and before it got to the railroad crossing, did it whistle?

A. No, sir; it whistled at the time it started.

Q. Well, then, it stopped there and whistled twice?

A. Yes, sir.

Q. Then he started?

A. Yes, sir; he started.

Q. How far did he go?

A. He got over the crossing a hundred and forty feet from here.

Q. Then he stopped?

A. Yes, sir.

Q. What did he stop for?

A. Because he saw the funeral.

Q. Where was the funeral when he stopped there?

A. It was part of it over and part of it was not; then he stopped and stood still there; he saw the funeral passing by and then he stood still; then he saw the road was clear and started; I turned round and there was three carriages away from the crossing.

Q. Where was the last buggy when he started?

A. It was here on Monroe street where that wood office is.

Q. How far is that from here; how far from Monroe street?

23 A. The last buggy in the procession was a block and a half or two blocks from the railroad crossing.

Q. When this engine started?

A. Yes, sir; when it started the second time.

Q. When he started the second time did he whistle?

A. I can't swear positively about that; I wouldn't say that for sure whether he whistled the second time; I don't know whether he did whistle or not.

Q. Did he whistle the second time when he stopped there?

A. I wouldn't swear to that.

Q. Do you know whether he whistled or not?

A. No, sir.

Q. Where was the engine and where was the horse when it jumped?

A. The horse jumped; when the horse jumped it was just ninety feet from the engine.

Q. How far from Monroe street?

A. It was a hundred and twenty-five feet from the crossing, exactly, and across here to the engine it was ninety feet.

Q. Where was the buggy when the horse jumped?

A. It was a hundred and twenty-five feet from the level crossing.

A JUROR: The reason he stopped the second time was because the engineer saw the funeral procession was crossing the crossing?

A. Yes, sir.

Q. What was the reason the engineer stopped the second time?

Objected to.

WITNESS: Because he saw the funeral at the crossing and then he stopped.

Q. Then part of the funeral was left on one side and part on the other side?

A. Yes, sir.

Q. At the time he stopped part of the funeral was here and part of it there (indicating on map)?

A. Yes, sir; at the time he stopped it was on the crossing; he stopped directly he saw the road was not clear.

Q. Did you give any signal to the engineer or to the people in the funeral?

A. Not except that I paid my respects to the funeral.

Q. Are you working for the Great Northern Railway Company or for the Northern Pacific?

A. I am working for the Great Northern.

Cross-examination.

By Mr. EBERT:

Q. When they stopped the second time, after they had stopped the second time and commenced to move again they might have blown the whistle without your hearing it?

24 A. I don't believe it was; maybe it was; I can hear a railroad whistle, but I do not remember it very particularly and I wouldn't swear to it.

The defendant introduced as a witness U. S. DAVIS, head brakeman on the train, who testified among other things as follows:

A. As near as I can remember we came down I think on a stock train; I wouldn't be sure about that, but I am pretty positive about that; we made the stop for the railroad crossing of course on the right-hand side of the street crossing; between that and the other railroad crossing is a building and it stops the view so you can't see very plainly; it is customary for them not to use the whistle any more than necessary, but still as to whether or not the engineer whistled off brakes, I can't say.

Q. Whether he whistled off brakes that afternoon, you can't say?

A. No, I can't say; there was a funeral procession that afternoon crossing at the time he made the stop, as I suppose, but I can't say positively whether this gentleman gave the signal; I took it for granted he gave the signal, as there was a part in the funeral procession; I think the funeral procession had passed over; whether all the carriages had passed over I don't know exactly, but there was a kind of a break and I thought he had parted them to let the train pass; anyway the engineer started to cross and there was a horse that got frightened and ran away, and an old lady got hurt; however, we didn't stop to see, and I never heard anything more about it since.

Q. You say you can't recollect about the whistling?

A. No, sir; I don't; I can't say as to that.

Q. In coming to the railroad crossing—there are two crossings; first this railroad crossing and then this highway crossing?

A. Yes, sir.

Q. Coming to the railroad crossing you stopped?

A. Yes, sir.

Q. Did you whistle for that crossing?

A. Well, they are not supposed to whistle in the city limits any more unless it is necessary, but when it is necessary they are supposed to use it.

Q. Did he use the whistle before starting?

A. They always blow the whistle to release the brakes.

Q. Do you remember whether you got that signal that day from the engineer or not; whether he gave that signal or not?

A. You understand we use air brakes over there; I was on top of the train, but whether he gave the signal to release brakes I can't say.

Q. After you had come to a stop for the railroad crossing and had started up again and were approaching the highway crossing did you stop the second time?

25 A I wouldn't be positive; I think he did stop the second time.

Q. You say the view is obstructed there?

A. Yes, sir; the view over the other railroad crossing, that is, the right-hand side is obstructed.

Q. From this building on the right-hand side there is an obstructed view?

A. Yes, sir; it is between the two railroad crossings.

Q. (Map No. 2 shown witness.) Here is Monroe street and here is the highway crossing?

A. In here between these two railroad crossings there is a barrel factory; there is a building right in there, and of course it obstructs the view from this railroad crossing from seeing anything that comes up very close.

Q. You were crossing down here?

A. We were coming on the Northern Pacific track.

Q. Can you, as a matter of fact, locate where the funeral was?

A. The funeral crossed this crossing; I don't know whether it is Monroe street; we always call it the Monroe-street crossing.

Q. Did you notice the horse running away?

A. I noticed a horse being frightened; I was not very close to it; I saw some one thrown out of a buggy; I saw some one carrying an old lady.

Q. Can you tell how far he was over the crossing at the time the horse ran away?

A. No, sir; I can't say positively.

Q. I understand you to say that you can't say whether there were any whistles blown or not?

A. No, sir.

Q. That you can't remember?

A. No, sir.

Q. How long have you been railroading?

A. Four years ago last March.

Q. Are you still braking?

A. Yes, sir.

Q. You are accustomed to the handling of trains, are you not?

A. Yes, sir.

Q. Take it in a situation of that kind, where a train, having stopped, having run down near to the crossing in that locality as it was there in the city, and a funeral procession going over there, would it have been prudent for an engineer after the procession had passed or after he had supposed it to have passed to have started up his train again without giving the signal with the whistle?

Objected to as immaterial, incompetent and irrelevant, because under the ordinance of the city of Minneapolis, there must be imminent danger before the whistle can be used, and also on the ground that the question asked is one for the jury to determine.

26 The COURT: There is evidence that there are two modes of signaling before putting a train in motion, one by whistling and the other by ringing the bell. The ordinance in question declares that any person or persons who shall sound or cause to be sounded, blow or cause to be blown, any whistle of any locomotive engine within the limits of the city of Minneapolis, unless at the time the act was done there was imminent danger to life or prop-

erty and that the whistle was sounded as a warning of such danger. I think that is a question of fact for the jury. You may prove what you can with reference to the facts, but I am not ready to hold that this is — question for expert testimony.

This train, as is shown by the testimony of the last witness upon the stand, had crossed the railroad crossing proper and had come to a stand-still, and witness says it was because it was confronted with this funeral procession.

Now, whether when that train again started the whistle was sounded because there was imminent and immediate danger to life and property, is a question of fact for the jury and not a question for expert testimony. You may show if you can by the evidence of this or any other witness that that train could not have been started with safety to that funeral procession or any other person or persons or to any property without the use of the whistle. You may show any fact that would tend to prove that there was imminent or immediate danger to life or property if he started otherwise than by using the whistle.

Objection sustained.

Q. Were they all air brakes on this train?

A. I think they were; I don't know positively though.

Q. Is the bell ever used to let off the brakes?

A. No, sir.

Q. The bell is never used as a method of signaling to communicate with the trainmen?

A. No, sir; it is used as a warning that the train is about to start.

Q. You say the bell is not used as a means of communicating with the trainmen?

A. No, sir; not otherwise than that the train will start.

Q. Not to release the brakes?

A. No, sir.

Cross-examination.

By Mr. EBERT:

Q. If I understand you correctly, there were air brakes there; is that correct?

A. Yes, sir; I said I didn't know positively if they were all air brakes; but I could absolutely swear that two-thirds of them were air brakes.

27 Q. Who regulates the air brakes, who manipulates them?

A. In running the train?

Q. Yes.

A. The engineer.

Q. Such brakes are not applied by the brakeman?

A. No, sir; not air brakes.

The COURT: Where the whistle is not used to start, what signal is used?

WITNESS: The bell is rung.

The COURT: What does that indicate?

WITNESS: It indicates that the train is ready to start.

The COURT: Will it start on the ringing of the bell?

WITNESS: As I understand it, in the city limits they are not to use the whistle only when the view is obstructed.

The COURT: Would the ringing of the bell on that locomotive on the occasion spoken of start that train?

WITNESS: Yes, sir; it would.

Q. How do you mean that? The judge asks you if the ringing of the bell would start the train.

A. It wouldn't start the train; it would give the signal that the engineer was ready to start the train.

Q. If the engineer got the signal from the conductor to go on, then the engineer rings his bell and then starts his train?

A. Yes, sir.

The COURT: Does not the engineer control the air brakes?

WITNESS: Yes, sir.

The COURT: He applies them and takes them off?

WITNESS: Yes, sir.

The COURT: He does not have to give any signal for that; that is his own act?

WITNESS: Yes, sir; that is his own act.

The defendant introduced as a witness JOHN HORAN, who testified as follows:

Q. Where do you live?

A. I live in St. Paul.

Q. How long have you lived there?

A. I have lived there five years; the last time I moved there.

Q. What is your business?

A. Locomotive engineer.

Q. For what road?

A. Northern Pacific railroad.

Q. How long have you acted as a locomotive engineer in that business?

A. About thirteen years.

Q. You are now in the employ of this company and have been for five years?

A. For ten years for the Northern Pacific Railroad Company.

28 Q. Operating both passenger and freight engines?

A. Yes, sir.

Q. Through this State and this city?

A. Yes, sir.

Q. Do you know the location in question here?

A. Yes, sir.

Q. Have you operated your locomotive and train through there?

A. Yes, sir.

Q. How is it in coming from the north, coming down to that railroad crossing—I am not speaking of the Monroe-street crossing, but the railroad crossing—if you are operating a freight train, what is the method of operating a freight train?

A. Well, we come to a full stop, and after I come to a full stop I generally give two short blasts of the whistle to warn other trains which may come in that way on the St. Paul and Northern Pacific crossing, if there should happen to be any there; when that is all right we blow a whistle and start the train and go on and run to St. Paul.

Q. Do you know what the grade is there; what way is the grade, up or down?

A. It is down grade coming towards Minneapolis from the north to this place; not all the way, but after you get about half way to Minneapolis it is down grade; down grade to the Minneapolis yard.

Q. Is the view obstructed at all, the view of the street ahead?

A. It is not obstructed.

Q. I mean the lateral view; the side view?

A. Yes, sir; it is obstructed to the right coming this way; there is a large cooper shop there that obstructs the view that way. (Map No. 2 shown witness.)

WITNESS: I think the cooper shop is right there (indicating).

Q. That is just south of Mulberry-street road?

A. Yes, sir; if you come from that way you can see whether there was anything on the track and I would give two whistles to notify any engineers or any one that might be there that I was going to use the crossing; I would do that for safety.

Q. Assuming that your train—you have a freight train—and that you have run down within a hundred and fifty feet of the Monroe-street railroad crossing intending to cross over and you have been suddenly stopped by a funeral procession in which there were fifteen or twenty or more vehicles on a Sunday afternoon, state what, if anything, it would have been necessary to do in starting up your train again.

A. For starting the train again?

Q. Yes; state as to signals and warnings.

A. I would have the fireman ring the bell, and if I seen any other teams coming or anything coming on that crossing, if I had any doubts about whether they were going to stop or not I should give them a short blast of the whistle as a safe precaution to keep them off the crossing.

29 Q. Tell the court and jury why it would be necessary in that condition of affairs to give this blast of the whistle.

A. Well, because there is a good many people, either with teams, or on foot, that has got to be a kind of natural about running races with engines when they are coming to the crossing. Nine out of ten times you don't know whether they are trying to commit suicide or trying to get across ahead of you. Frequently we don't know whether they are trying to get ahead of us or not. We invariably give a blast of the whistle as a matter of precaution; one or two, generally, or sometimes three.

Q. Suppose that you have got your train under headway in that situation and that finding that there was danger you had stopped your train within a hundred and forty feet of that crossing and then got your train under motion expecting to go over the crossing

and you saw this other train, could you stop your train in time to avoid a collision?

A. No, sir; it would depend on the speed.

Q. Take the circumstances as they are?

A. It would depend upon circumstances; if they are within ten feet of me I couldn't stop, but if I was back fifty or seventy-five or a hundred feet here, of course if I was going slow I could probably stop.

Q. If you had been at this point, north of this street, and had run forty feet under motion you couldn't stop?

A. I couldn't if I was close to it; I couldn't stop.

Q. You men don't take any chances; you don't experiment as to whether you can stop or not?

A. We take the safest course; those are our instructions.

Q. A collision with a locomotive and a traveler nine times out of ten means death to him?

A. Yes, sir; generally.

Cross-examination.

By Mr. EBERT:

Q. This obstruction you had reference to—this house—this is above the place where the two railroad tracks cross each other?

A. It is right at the corner; right at the angle made by the two crossings.

Q. From the place where the railroad crossing is where those two tracks cross each other down to Monroe-street crossing there is no obstruction?

A. No, sir; I think not.

Q. When did you see that funeral procession first?

A. I don't know whether I was in the State of Minnesota or not.

Mr. O'BRIEN: This is not the engineer of that train—the engineer of that train is dead.

30 Q. Do you know the speed at which locomotives and trains are allowed to run here in the city?

A. Well, I think I do; yes, sir.

Q. What is it?

A. It varies in different places; six miles an hour.

Q. I mean in the city of Minneapolis?

A. Six miles an hour I think; from six to ten miles an hour.

Q. Here in the city?

A. Six miles an hour we generally run through this city.

The defendant also introduced evidence tending to show that plaintiff had received no serious or permanent injuries from the accident, and was as able to pursue his occupation of a switchman as well subsequent as prior thereto; that plaintiff was not suffering from paralysis of the right arm or injury to the spine, but that he was suffering from nervous debility, the result of chronic alcoholism. The evidence established the fact that the blowing of the locomotive whistle frightened the plaintiff's horse.

Thereupon, the court of its own motion, charged the jury among other things as follows: "Your first inquiry will be, was the defendant negligent in blowing the whistle at the time and place and under the circumstances it was blown? An ordinance of this city provides that no person or persons shall sound, or cause to be sounded, blow, or cause to be blown, any whistle of any locomotive engine within the limits of the city of Minneapolis, unless it appears that at the time the act was done, there was imminent and immediate danger to life or property, and that the whistle was sounded as a warning of such danger.

I instruct you that if you find from the evidence that the defendant's engineer at the time and place mentioned, and within the corporate limits of the city of Minneapolis, blew a loud blast or blasts of the locomotive whistle, and that at the time the act was done there was no imminent or immediate danger to life or property, and the whistle was not sounded as a warning of such danger, then the blowing of the whistle was a negligent act. If you find that the defendant was not guilty of negligence within the rule I have laid down, then you will inquire no further, but return a verdict for the defendant. But if you find that the engineer blew the whistle at the time and place mentioned, and that the blowing of the whistle was a negligent act, then you will enquire whether that act of negligence frightened plaintiff's horse and caused the wrecking of the buggy and the running away of the horse by reason of which the plaintiff himself suffered the alleged injuries complained of.

If you find these issues in favor of the plaintiff, that is, that the whistle was blown and that at the time and under the circumstances it was blown, it was a negligent act, and that that act of negligence was the direct and proximate cause of the plaintiff's injury, you will then inquire into the extent of his injuries and the damage sustained by reason thereof."

31

The counsel for defendant duly excepted to the following portion of said charge.

"I instruct you that if you find from the evidence that the defendant's engineer at the time and place mentioned, and within the corporate limits of the city of Minneapolis, blew a loud blast or blasts of the locomotive whistle, and that at the time the act was done there was no imminent or immediate danger to life or property, and the whistle was not sounded as a warning of such danger, then the blowing of the whistle was a negligent act."

The defendant, before the jury retired, requested the court to charge the jury as follows: "The court instructs the jury to bring in a verdict for the defendant," which request was refused, and the defendant duly excepted to the ruling and decision of the court.

The defendant, before the jury retired, requested the court to charge the jury as follows:

"If the jury believe from the evidence that it was necessary and customary in the proper operation of defendant's road, having due regard to the safety of the public, to blow the whistle of the engine at all the time or times you may find it was blown, then in that

case your verdict must be for the defendant, and it makes no difference whether plaintiff's horse was frightened by the whistling of said locomotive or not," which request was refused by the court, and the defendant duly excepted to the ruling and decision of the court.

The jury retired and rendered a verdict in favor of the plaintiff and against the defendant for the sum of $4,500.

Because the foregoing matters and things do not appear of record in said action, the judge who tried said case, finding the same to be true and correct, has signed and sealed this bill of exceptions this 29th day of March, A. D. 1892, and ordered that the same be made a part of the record in said case.

HENRY C. CALDWELL,
Circuit Judge.

Indorsed: "Filed Apr. 1st, 1892. Oscar B. Hillis, clerk, by G. F. Hitchcock, Jr., deputy."

UNITED STATES OF AMERICA:

Circuit Court of the United States, District of Minnesota, Third Division.

I, Oscar B. Hillis, clerk of said circuit court, do hereby certify and return to the honorable, the United States circuit court of appeals for the eighth circuit, that the foregoing, consisting of
32 63 pages, numbered consecutively from 1 to 63 inclusive, is a true and complete transcript of the records, process, pleadings, order, final judgment and all other proceedings in said cause and of the whole thereof, as appears from the original records and files of said court; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation, together with the proof of service thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Saint Paul, in the district of Minnesota, this 6th day of June, A. D. 1892.

Seal of the U. S. Circuit Court, Dist. of Minnesota, Fourth Division.

OSCAR B. HILLIS, *Clerk,*
By G. F. HITCHCOCK, JR., *Deputy.*

Filed June 9, 1892.

JOHN D. JORDAN, *Clerk.*

33 And on the fifteenth day of June, A. D. 1892, an appearance of counsel for plaintiff in error was filed in the clerk's office of said circuit court of appeals in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit.

NORTHERN PACIFIC RAILROAD CO., Plaintiff in Error, *vs.* JEREMIAH SULLIVAN, Defendant in Error. } October Term, 1891.

The clerk will enter my appearance as counsel for the plaintiff in error.

JNO. C. BULLITT, JR.
TILDEN R. SELMES.

Endorsed: "U. S. circuit court of appeals, eighth circuit. 1891, October term. No. 137. Northern Pac. R. R. Co., plaintiff in error, *vs.* Jeremiah Sullivan. Appearance. Filed Jun- 15, 1892. John D. Jordan, clerk. Jno. C. Bullitt, Jr., & Tilden R. Selmes, St. Paul, Minn., counsel for pl'ff in error."

And on the eleventh day of August, A. D. 1892, an appearance of counsel for defendant in error was filed in the clerk's office of said circuit court of appeals in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Pl'ff in Error, *vs.* JEREMIAH SULLIVAN, Defendant in Error. } October Term, 1892.

The clerk will enter my appearance as counsel for the defendant in error.

CHS. A. EBERT.

Endorsed: "U. S. circuit court of appeals, eighth circuit. 1891, October term. No. 137. Northern Pacific R. R. Co. *vs.* Jeremiah Sullivan. Appearance. Filed Aug. 11, 1892. John D. Jor-
34 dan, clerk. C. A. Ebert, counsel for def't in error."

And on the thirteenth day of October, A. D. 1892, there was filed in the clerk's office of said United States circuit court of appeals in said cause a stipulation and certified copy of order staying execution and denying motion for new trial in words and figures following, to wit:

United States Circuit Court of Appeals for the Eighth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error, *vs.* JEREMIAH SULLIVAN, Defendant in Error.

It is hereby stipulated by and between the parties to the above-entitled action that the record of said cause certified by the clerk

of the United States circuit court for the district of Minnesota be amended by adding thereto the annexed order denying motion for new trial in said cause which was left out by the said clerk of the United States circuit court in the record which he certified to this court.

Dated October 11th, 1892.

TILDEN R. SELMES,
Attorney for Plaintiff in Error.
CHS. A. EBERT,
Attorney for Defendant in Error.

JEREMIAH SULLIVAN
vs.
NORTHERN PACIFIC RAILROAD COMPANY.

The petition of the defendant for a new trial in this cause is overruled and denied and the defendant is granted thirty days time in which to prepare a bill of exceptions in the cause and submit the same to the judge.

HENRY C. CALDWELL,
Circuit Judge.

UNITED STATES OF AMERICA,
District of Minnesota, Fourth Division, } *sct:*

35 I, Oscar B. Hillis, clerk of the circuit court of the United States for the district of Minnesota, do hereby certify that I have carefully compared the foregoing paper-writing with the original thereof, which is in my custody as such clerk, and that such copy is a correct copy of such original and of the whole thereof in the cause therein named.

Witness my hand as clerk and the seal of said court. Done at my office, in Minneapolis, Minnesota, this 3d day of October, A. D. 1892.

[SEAL.]

OSCAR B. HILLIS, *Clerk,*
By N. M. CARROLL, *Deputy.*

Endorsed: "No. 137. United States circuit court, district of Minnesota, fourth division. Jeremiah Sullivan, plaintiff, *vs.* N. P. R. R. Co., defendant. Stipulation and certified copy of the order staying execution & denying motion for new trial. Filed Oct. 13, 1892. John D. Jordan, clerk."

And on the eighteenth day of October, A. D. 1892, in the record of the proceedings of said circuit court of appeals is an entry in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
JEREMIAH SULLIVAN, Defendant in Error.
} No. 137.

In error to the circuit court of the United States for the district of Minnesota.

TUESDAY, *October* 18, 1892.

This cause having been called for hearing in its regular order, Judge Caldwell retires, being disqualified by reason of having presided at the trial in the court below. Argument is thereupon commenced by Mr. Tilden R. Selmes, counsel for plaintiff in error, continued by Mr. C. A. Ebert, counsel for the defendant in error,
36 and concluded by Mr. Selmes, in behalf of plaintiff in error.

Thereupon this cause is submitted to the court upon the transcript of the record from said circuit court and the briefs of counsel filed herein.

And on the thirty-first day of October, A. D. 1892, an opinion of said United States circuit court of appeals was filed in said cause in the following words, to wit:

37 United States Circuit Court of Appeals, Eighth Circuit, October Term, A. D. 1891.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
JEREMIAH SULLIVAN, Defendant in Error.
} No. 137. In Error to the Circuit Court of the United States for the District of Minnesota.

Mr. J. H. Mitchell, Jr., Mr. Tilden R. Selmes, for plaintiff in error.
Mr. C. A. Ebert, for defendant in error.

Before Sanborn, circuit judge, and Shiras, district judge.

SHIRAS, *District Judge*, delivered the opinion of the court:

The defendant in error, Jeremiah Sullivan, brought this action in the district court of Hennepin county, Minnesota, to recover damages for personal injuries caused him by being thrown from a buggy, the horse attached thereto having taken fright at the blowing of a whistle on a locomotive engine on the road of the plaintiff in error. The case was removed by the defendant company into the United States circuit court for the district of Minnesota and on the trial before the court and jury the plaintiff recovered a verdict. To reverse the judgment entered in favor of the plaintiff, the defendant company brings the case to this court on a writ of error.

The material facts developed by the evidence are as follows: On

the 10th day of November, 1889, the plaintiff below attended a funeral in the city of Minneapolis, which, starting from Cedar avenue, proceeded to the cemetery by way of Monroe street, which crosses the track of the defendant company; that when the funeral procession, which consisted of some forty carriages and buggies, reached the Monroe-street crossing, a freight train on the de-
38 fendant's road was approaching the same; that the train halted at a point where the track of the defendant road crossed that of the Great Northern Railway Company, distant some two or three hundred feet from the street crossing; that the freight train was then put in motion and again halted before reaching the street crossing at a point variously estimated by the witnesses to be from thirty to one hundred and twenty-five feet from the crossing; that Monroe street does not cross the railway at right angles; that at this crossing a flagman is stationed by the railway company to give warning of danger in case of need, to parties about to cross the track; that this flagman was at his post on said 10th of November, 1889; that the funeral procession proceeded along Monroe street across the railway track, the plaintiff being about the middle of the procession; that when the plaintiff had gotten over the crossing and was still within a short distance thereof, the engineer blew the whistle on the locomotive, at which plaintiff's horse took fright and ran away, the plaintiff being thrown from the buggy and receiving the injuries complained of; that when the blasts of the whistle were so sounded the train was not in motion; that the train was equipped with air brakes; that upon sounding the whistle the engineer started the train forward, passing over the Monroe-street crossing; that at that time there was in force in the city of Minneapolis an ordinance which in effect forbade the blowing of the whistle upon a locomotive engine within the limits of the city of Minneapolis, unless at the time there might be imminent and immediate danger to life or property, in which case the whistle might be sounded as a warning of such danger. The charge of the court to the jury was as follows:

"Your first inquiry will be, Was the defendant negligent in blowing the whistle at the time and place and under the circumstances it was blown? An ordinance of this city provides that no person or persons shall sound, or cause to be sounded, blow, or cause to be blown, any whistle of any locomotive engine within the limits of the city of Minneapolis, unless it appears that at the time the act was done, there was imminent and immediate danger to life or property, and that the whistle was sounded as a warning of such danger.

"I instruct you that if you find from the evidence that the defendant's engineer at the time and place mentioned, and within the corporate limits of the city of Minneapolis, blew a loud blast or blasts of the locomotive whistle, and that at the time the act was done there was no imminent or immediate danger to life or property, and the whistle was not sounded as a warning of such danger, then the blowing of the whistle was a negligent act. If you find that the defendant was not guilty of negligence within the rule I have

laid down, then you will inquire no further, but return a verdict for the defendant. But if you find that the engineer blew the whistle at the time and place mentioned, and that the blowing of the whistle was a negligent act, then you will inquire whether
39 that act of negligence frightened plaintiff's horse and caused the wrecking of the buggy and the running away of the horse, by reason of which the plaintiff himself suffered the alleged injuries complained of.

"If you find these issues in favor of the plaintiff, that is, that the whistle was blown and that at the time and under the circumstances it was blown, it was a negligent act, and that that act of negligence was the direct and proximate cause of the plaintiff's injury, you will then inquire into the extent of his injuries and the damage sustained by reason thereof."

There are five assignments of error, but in the brief of counsel for the plaintiff in error it is said "the assignments of error in effect raise only this one question: Did the court err in ruling, that proof of the non-observance of a city ordinance is a conclusive presumption of negligence?"

Counsel for the railway company have collated in their brief a large number of cases in which this general proposition has been discussed and from a consideration thereof reach the conclusion that "the three rules deducible from the decisions are, 1st. The non-observance of a city ordinance is not any evidence whatever of negligence. 2d. It is evidence of negligence to go to the jury. 3d. It is conclusive evidence of negligence," and further that "the decisions of the Supreme Court of the United States seem to have left no doubt as to the rule in this court, that is, that the failure to observe a city ordinance is simply evidence of negligence and this, it is submitted, is in accordance with the weight of authority and the only logical conclusion," and in support of the latter proposition counsel cite the cases of Hayes *v.* Michigan Central R. R. Co., 111 U. S. 228, and Grand Trunk R'y Co. *v.* Ives, 144 U. S. 408.

The only portion of the charge of the court to which exception was taken is that sentence wherein the court said, "I instruct you that if you find from the evidence that the defendant's engineer at the time and place mentioned, and within the corporate limits of the city of Minneapolis, blew a loud blast or blasts of the locomotive whistle, and that at the time the act was done there was no imminent or immediate danger to life or property, and the whistle was not sounded as a warning of such danger, then the blowing of the whistle was a negligent act." In determining the meaning of this charge it must be read in connection with the other portions of the instructions and in the light of the facts developed in the evidence and so reading it, we do not concur with counsel for the railway company in the assumption that the court intended thereby to lay down the broad proposition that under all circumstances a violation of a city ordinance is *per se* negligence. On the contrary the jury were expressly charged that "your first inquiry will be Was the defendant negligent in blowing the whistle at the time and place and under the circumstances it was blown?" The jury were not in-

structed to determine from the evidence whether the city or-
40 dinance was violated, but to determine whether the whistle was in fact blown and if so, whether the blowing the same at the time, place and under the circumstances was or not an act of negligence. In defining to the jury what would be deemed to be negligence in this particular, the court used the phraseology found in the city ordinance, adopting the same as a correct statement of the law applicable to the facts of the case. The declaration of the court was not that the act of blowing the whistle was negligence, because thereby the ordinance was violated, but that if there was not any imminent or immediate danger to life or property requiring the blowing the whistle as a warning of such danger, then the blowing of the same at the time, place and under the existing circumstances was negligence.

It is well settled that when there is no substantial dispute as to the material facts, and diverse conclusions cannot be reasonably drawn therefrom, the question of negligence becomes one of law upon which the court may instruct the jury, and the court may instruct the jury that if they, from the evidence, find certain facts established, then the conclusion of negligence follows.

Thus in Cooley on Torts, 804, it is said, "If the facts are not ambiguous, and there is no room for two honest and apparently reasonable conclusions, then the judge should not be compelled to submit the question to the jury as one in dispute. On the contrary he should say to them, 'In the judgment of the law this conduct was negligent,' or as the case might be, 'There is nothing in the evidence here which tends to show a want of due care.' In either case he draws the conclusion of negligence or the want of it as one of law."

In Shearman and Redfield on Negligence, § 56, the rule is stated in the following terms: "When the facts are clearly settled, and the course which common prudence dictated can be clearly discerned, the court should decide the question as a matter of law."

In Delaware, Lackawanna & Western R. R. Company *v.* Converse, 139 U. S. 469, this question is considered at length in a case wherein a person was injured by a collision between the vehicle in which he was riding and certain freight cars, and in which case the trial court instructed the jury that the facts showed that the railway company had been guilty of negligence, as a matter of law.

After reciting the facts, the supreme court states the proposition and the rule of law thereon as follows: "Upon, substantially, these facts, about which there could not be any dispute, the court instructed the jury, as matter of law, that the railroad company was negligent in respect to its duty to persons traveling upon the public road in question; and that the plaintiff was entitled to recover damages for any injuries sustained by him as the result of such negligence, unless it appeared that he contributed to such injuries by his own carelessness. It is contended that the
41 court erred in not submitting to the jury the issue as to defendant's negligence. Undoubtedly, questions of negligence, in actions like the present one, are ordinarily for the jury,

under proper directions as to the principles of law by which they should be controlled. But it is well settled that the court may withdraw a case from them altogether and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. Phœnix Ins. Co. *v.* Doster, 106 U. S. 30, 32; Griggs *v.* Houston, 104 U. S. 553; Randall *v.* Baltimore & Ohio Railroad, 109 U. S. 478, 482; Anderson County Commissioners *v.* Beal, 113 U. S. 227, 241; Schofield *v.* Chicago & St. Paul Railway Co., 114 U. S. 615, 618.

"'It would be an idle proceeding,' this court said in North Penn. Railroad *v.* Commercial Bank, 123 U. S. 727, 733, 'to submit the evidence to the jury when they could justly find only one way.' In the present case, it was incumbent on the plaintiff, as a condition of his right to recover, to prove that the defendant was guilty of negligence, resulting in his being injured, and, that issue being in his favor, he was entitled to a verdict unless it appeared that his own negligence substantially contributed to his injury. If the evidence was so conclusive against the defendant, upon the question of its negligence, that the jury could not reasonably find to the contrary, it was competent for the court, within the doctrines of the cases above cited, to so instruct them, leaving the jury to determine the question of the plaintiff's negligence, in respect to which the evidence is conflicting.

"The inquiry, therefore, is, whether the court erred in holding, as matter of law, under the evidence, that the defendant was guilty of negligence. Upon this question we entertain no doubt. While those using a public highway are under a duty to keep out of the way of railroad cars crossing it, and to exercise to that end such care as the circumstances make necessary, the railroad company, in having cars upon its road, is bound to observe like care towards those who, while traveling upon such highways, whether on foot or in vehicles, are obliged to pass over its tracks. The right of a railroad company to the use of its tracks for the movement of engines and cars is no greater in the eye of the law than the right of an individual to travel over a highway extending across such tracks. The former is granted, subject to the condition, necessarily implied, that it shall be so used as not unreasonably to interfere with or abridge the latter. The obligation to use one's property in such a manner as not to injure that of others rests equally upon corporations and individuals. The duty of railroad companies whose tracks cross public highways at grade to give warning to those traveling upon them has been under consideration in many cases. When the subject is regulated by statute, it may not be difficult, in a particular case, to determine whether the railroad company has
42 performed its duty in that regard to the public. If there be no statute prescribing in what mode the necessary warning shall be given when a train of cars approaches a public highway that crosses a railroad track at grade, the question of negligence must be determined by the special circumstances of each case. In

some localities, in thickly settled communities, greater vigilance and more safeguards are required upon the part of the railroad company than would be necessary in other localities. What would be due care in one locality might be negligence in another. A very high degree of caution and circumspection is required under some circumstances. Without attempting to formulate a general rule applicable in every case of injury to person or property, it is sufficient here to say that the severing of the defendant's train of cars in the night-time, leaving a part of them, uncontrolled otherwise than by ordinary brakes, to run across a public highway at grade, without some warning, by a flagman or by bell or whistle, or in some other effective mode, that they were approaching, was in such obvious disregard of the rights of persons using that highway, that the court was justified in saying, as a matter of law, not simply that such facts were evidence of negligence, but that they constituted negligence, upon part of the company. It was justified in so instructing the jury, because every one knows, and therefore the court below knew, that such use of the defendant's tracks, where they crossed the county road, unnecessarily endangered the safety of any one who, at the time, crossed the railroad tracks while traveling on that highway. * * * The court in our judgment did not err in holding, as matter of law, upon the undisputed facts in the case, that the defendant was guilty of negligence in the particulars to which we have adverted."

We have quoted at length from this decision of the Supreme Court because the rule therein given and the reasoning upon which it is based are so closely applicable to the case at bar and so clearly sustain the action of the trial court. Certainly it is a matter of common knowledge that horses are liable to take fright at the escaping steam and noise caused by the blowing of locomotive whistles in close proximity to them. The management of one's own property in such a way as to cast unnecessary risk and danger upon another is negligence, and therefore the trial court was entirely justified in instructing the jury, that if the engineer on defendant's train when the same was standing still near to the street crossing and when the vehicles composing the funeral procession were upon the crossing or in close proximity thereto, without need or cause therefor, blew the engine whistle he was guilty of negligence in so doing. In the absence of any ordinance in force in the city of Minneapolis, the action of the court was justified and demanded by the principles of the common law and in this particular, under the existing facts, the provisions of the city ordinance are in accord with the rule of the common law.

43 The court left it to the jury to say whether at the time the whistle was blown there existed any immediate or imminent danger to life or property which would require the blowing of the whistle as a warning of danger, in which case the court ruled that the law would not hold the blowing of the whistle to be an act of negligence.

The verdict of the jury, being for the plaintiff below, necessarily negatives any claim that the whistle was sounded as a warning of

immediate danger to either property or persons and therefore the proposition is reduced to the question, whether the trial court under the facts of the case, was justified in holding as matter of law, that the engineer was guilty of negligence in that when protection or care for life or property did not call for the sounding of the whistle as a warning against danger, and when by the terms of the city ordinance then in force he was forbidden to sound the whistle, he nevertheless blew the same when the plaintiff and others with the horses and vehicles forming the funeral procession were in close proximity to the engine and thereby subjected the plaintiff and others to the danger of their horses taking fright at the steam and sound proceeding from the whistle thus blown. In our judgment the facts of this case fully justified such ruling on part of the trial court and no just exception can be taken to the charge either in whole or in part. As we construe the charge as a whole, the trial court did not rule broadly that a violation of a city ordinance is always conclusive evidence of negligence, nor did the court give to the ordinance in question any other or greater probative force than was awarded to the ordinances in the cases of Hayes *v.* Michigan Central R. R. Co., 111 U. S., 228, and Grand Trunk R'y Co. *v.* Ives, 144 U. S., 408, upon which counsel for plaintiff in error rely as giving the rule applicable to this case. We do not, therefore, feel called upon to decide the abstract proposition discussed by counsel for plaintiff in error, to wit: Whether a violation of a city ordinance, lawfully passed for the protection of life or property, is to be deemed negligence *per se* because the standard of care fixed by the ordinance has not been observed or whether such violation is but a circumstance to be submitted to and weighed by the jury in connection with all the other facts in considering the question of negligence.

The judgment of the circuit court is—

Affirmed.

Filed October 31, 1892.

A true copy.

Attest: ——— ———,

Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

44 And on the thirty-first day of October, A. D. 1892, in the record of the proceedings of said circuit court of appeals is a judgment in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
JEREMIAH SULLIVAN, Defendant in Error. } No. 137.

In error to the circuit court of the United States for the district of Minnesota.

MONDAY, *October* 31, 1892.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Minnesota and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and that Jeremiah Sullivan recover against the Northern Pacific Railroad Company the sum of twenty dollars for his costs herein and have execution therefor.

October 31, 1892.

And on the third day of December, A. D. 1892, there was filed in the clerk's office of said circuit court of appeals a petition for writ of error in words and figures following, to wit:

United States Circuit Court of Appeals for the Eighth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
JEREMIAH SULLIVAN, Defendant in Error. } Petition.

To the honorable judges of the United States circuit court of appeals for the eighth circuit:

45 Your petitioner, The Northern Pacific Railroad Company, the plaintiff in error in the above-entitled action, respectfully shows that by the judgment heretofore rendered by the United States circuit court of appeals for the eighth circuit in the above-entitled cause a manifest error hath happened, to the great damage of your petitioner, in this: that a great and manifest error of law occurred at the trial of said cause against the objection of your petitioner and to its great damage, all of which will more fully appear by the record of said court in said case.

Wherefore your petitioner prays that your honors allow a writ of error from the Supreme Court of the United States to be directed to said United States circuit court of appeals for the eighth circuit, whereby, under the seal of said United States circuit court of appeals for the eighth circuit, the record and proceedings aforesaid, with all things concerning the same, may be transmitted to the Supreme

Court of the United States with said writ of error, and that, the record and proceedings aforesaid being duly inspected, the said Supreme Court of the United States will cause further to be done therein and correct that error what of right and according to the laws and custom of the United States should be done.

JAMES McNAUGHT,
J. H. MITCHELL, JR., &
TILDEN R. SELMES,
Attorneys for Petitioner.

Endorsed: "U. S. circuit court of appeals, 8th circuit. N. P. R. R. Co., pl'ff in error, *vs.* Jeremiah Sullivan. Petition. Filed Dec. 3, 1892. John D. Jordan, clerk."

And on the third day of December, A. D. 1892, there was filed in the clerk's office of said circuit court of appeals an assignment of errors in words and figures following, to wit:

United States Supreme Court.

NORTHERN PACIFIC RAILROAD, Plaintiff in Error,
vs.
JEREMIAH SULLIVAN, Defendant in Error.

Assignment of Errors.

46 Now comes the above-named plaintiff in error, The Northern Pacific Railroad Company, by James McNaught, its attorney, and says that in the record and proceedings in the above-entitled action in the United States circuit court of appeals for the eighth circuit there is manifest error, in this, to wit:

First. The plaintiff in error assigns as error the several errors set out in the assignment of errors forming part of the record in the above-entitled action before said circuit court of appeals.

Second. The said circuit court of appeals, before which was heard the writ of error which brought up the record in this action from the circuit court of the United States for the district of Minnesota, fourth division, to said circuit court of appeals, erred in making its order on the 30th day of October, 1892, affirming the judgment of the said circuit court and directing a mandate to issue to the circuit court of the United States for the district of Minnesota directing that court to proceed in accordance with the decision and order of said circuit court of appeals.

Third. That said circuit court of appeals erred in not sustaining the writ of error then before it and not reversing the judgment entered in this action in said circuit court and in not directing a new trial of the issues raised by the pleadings in said action.

And said Northern Pacific Railroad Company, the plaintiff in error, prays that the judgment aforesaid entered herein in the cir-

cuit court for the district of Minnesota, fourth division, and the order entered herein as aforesaid by the circuit court of appeals and the judgment of affirmance to be entered in said circuit court for the district of Minnesota, fourth division, upon said order of affirmance, for the errors aforesaid and for other errors in the record and proceedings aforesaid, be reversed, annulled, and altogether held for naught, and that the plaintiff in error may be restored to all things which it hath lost by occasion of said judgments and order.

JAMES McNAUGHT,
J. H. MITCHELL, JR., &
TILDEN R. SELMES,
Attorneys for Plaintiff in Error.

Endorsed: "Supreme Court United States. N. P. R. R. Company, pl'ff in error, *vs.* Jeremiah Sullivan. Assignment of
47 errors. Filed Dec. 3, 1892. John D. Jordan, clerk."

And on the third day of December, A. D. 1892, there was filed in the clerk's office of said circuit court of appeals a supersedeas bond in words and figures following, to wit:

United States Circuit Court of Appeals for the Eighth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
JEREMIAH SULLIVAN, Defendant in Error.
} Bond.

Know all men by these presents that we, Northern Pacific Railroad Company, by Tilden R. Selmes, its attorney, and the Saint Paul Title Insurance and Trust Company, are held and firmly bound unto Jeremiah Sullivan, the above-named defendant in error, in the sum of ten thousand ($10,000.00) dollars, to be paid to said Jeremiah Sullivan, his heirs, executors, or administrators; for the payment of which, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our heirs, executors, and administrators, or successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 23rd day of November, A. D. 1892.

Whereas the above-named Northern Pacific Railroad Company has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the United States circuit court of appeals for the eighth circuit, at the May term of said court, A. D. 1892:

Now, therefore, the condition of this obligation is such that if the above-named Northern Pacific Railroad Company shall prosecute its said writ of error to effect and answer all costs if it shall fail to

make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

48 NORTHERN PACIFIC RAILROAD COMPANY,
By TILDEN R. SELMES, *Attorney.*
SAINT PAUL TITLE INSURANCE AND TRUST COMPANY,
By MAURICE AUERBADE,
President. [SEAL.]

Sealed and delivered in presence of—
M. E. CHAMBERLIN.
J. A. OWENS.

Attest: JAMES W. JONES,
Assistant Secretary.

Approved Nov. 29, 1892.
DAVID J. BREWER, *Justice.*

Endorsed: "U. S. circuit court of appeals, 8th circuit. N. P. R. R. Company, pl'ff in error, *vs.* Jeremiah Sullivan. Bond. The within bond is satisfactory. Chs. A. Ebert, att'y for def't in error. Filed Dec. 3, 1892. John D. Jordan, clerk."

And on the third day of December, A. D. 1892, there was filed in the clerk's office of said circuit court of appeals a præcipe for writ of error in words and figures following, to wit:

United States Circuit Court of Appeals for the Eighth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
JEREMIAH SULLIVAN, Defendant in Error.
} Præcipe.

To the clerk of the Supreme Court of the United States:

Please issue a writ of error to the Supreme Court of the United States in the above-entitled action and oblige—

JAMES McNAUGHT,
J. H. MITCHELL, JR., &
TILDEN R. SELMES,
Attorneys for Petitioner.

Endorsed: "U. S. circuit court of appeals, 8th circuit. N. P. R. R. Co., pl'ff in error, *v.* Jeremiah Sullivan. Præcipe. Filed Dec. 3, 1892. John D. Jordan, clerk."

49 And on the third day of December, A. D. 1892, a writ of error was filed in the clerk's office of said circuit court of appeals in said cause, the original of which is hereto attached and herewith returned:

50 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between The Northern Pacific Railroad Company, plaintiff in error, and Jeremiah Sullivan, defendant in error, a manifest error hath happened, to the great damage of the plaintiff in error, as is said, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 29th day of November, in the year of our Lord one thousand eight hundred and ninety-two, and of the Independence of the United States the one hundred and seventeenth.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk Supreme Court U. S.

Allowed by—

DAVID J. BREWER,
Associate Justice.

[Endorsed:] Original. Supreme Court of United States. N. P. R. R. Company, pl'ff in error, *vs.* Jeremiah Sullivan. Writ of error. Copy lodged in clerk's office for use of def't in error and filed December 3, 1892. John D. Jordan, clerk.

Return to Writ.

UNITED STATES OF AMERICA, *Eighth Circuit,* } *ss:*

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In witness whereof I hereto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, Missouri, this 22nd day of December, A. D. 1892.

JOHN D. JORDAN,
Clerk of the U. S. Circuit Court of Appeals, Eighth Circuit.

51 And on the ninth day of December, A. D. 1892, a citation was filed in the clerk's office of said circuit court of appeals in said cause, the original of which is hereto attached and herewith returned:

52 United States Circuit Court of Appeals for the Eighth Circuit.

NOTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
JEREMIAH SULLIVAN, Defendant in Error.
} Citation.

To Jeremiah Sullivan, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein The Northern Pacific Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 29th day of November, A. D. 1892.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Original. U. S. circuit court of appeals, 8th circuit. N. P. R. R. Co., pl'ff in error, *v.* Jeremiah Sullivan. Citation. Due service of the within citation is hereby admitted this 6th day of December, 1892. Chs. A. Ebert, attorney for def't in error. Filed Dec. 9, 1892. John D. Jordan, clerk.

53 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing pages, numbered from 1 to 52, inclusive, contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinion of said circuit court of appeals, in the case of Northern Pacific Railroad Company, plaintiff in error, *vs.* Jeremiah Sullivan, defendant in error, No. 137, October term, 1891, as the same remain upon the files and records of said United States cir-

cuit court of appeals. I further certify that the original writ of error and citation in said cause are hereto attached and herewith returned.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this 22nd day of December, A. D. 1892.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Endorsed on cover: Case No. 15,234. U. S. circuit court of appeals, 8th circuit. Term No., 203. The Northern Pacific Railroad Company, plaintiff in error, *vs.* Jeremiah Sullivan. Filed December 24, 1892.

Supreme Court
FILED
JAN 17 18
JAMES H. McKENN
Clerk

Supreme Court of the United States

OCTOBER TERM, A. D. 1895.

No. 203.

THE NORTHERN PACIFIC RAILROAD COMPANY
Plaintiff in Error,

vs.

JEREMIAH SULLIVAN,
Defendant in Error.

In error to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF DEFENDANT IN ERROR.

CHAS. A. EBERT,
HENRY EBERT,
Attorneys for Defendant in Error.

H. J. GJERSTEN,
Of Counsel.

Supreme Court of the United States,

OCTOBER TERM, 1895.

No. 203.

THE NORTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

JEREMIAH SULLIVAN,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

This action was brought in February, 1891, in the District Court of Hennepin county, in the state of Minnesota, and, on petition of the railroad company, it being a corporation created by act of congress, duly removed to the United States Circuit Court for the district of Minnesota.

The case was tried by a jury in September, 1891, before *Judge* Caldwell, and resulted in a verdict for the plaintiff for $4500,00; and on the same day judgment was entered for plaintiff for said sum.

A writ of error to review the judgment was sued out by the defendant from the Circuit Court of Appeals for the

8th circuit, where, on the 30th day of October, 1892, an order was entered, affirming the judgment of the trial court. An opinion, on the affirmance by the Circuit Court of Appeals, was delivered by *Judge* Shiras and is set forth in the record.

The defendant thereupon sued out a writ of error from this court, to review the judgment of affirmance.

The point relied on to obtain a reversal of the judgment of affirmance, is, as we understand it, that the trial court erred in giving the following instruction: "I instruct you that if you find from the evidence that the defendant's engineer at the time and place mentioned, and within the corporate limits of the city of Minneapolis, blew a loud blast or blasts of the locomotive whistle, and that at the time the act was done, there was no imminent or immediate danger to life or property, and the whistle was not sounded as a warning of such danger, then the blowing of the whistle was a negligent act."

In this, counsel for the railroad company assumes, the the court laid down the broad proposition, that under all circumstances a violation of a city ordinance is *per se* negligence, and for this reason—reversible error.

But taking the instruction together with the unquoted portion of the charge, by which the court expressly instructed the jury "your first inquiry will be, Was the defendant negligent in blowing the whistle at the time and place and under the circumstances it was blown?" and reading it in the light of the facts developed in the evidence, it is not open to the criticism of holding, that the violation of a city ordinance is in all cases *per se* negligence. Neither is it justly open to any other objection. It was fully warranted by the facts developed in the evidence and properly recognizes the common law principle, that in this class of cases the question is always, whether, under the circumstances of the particular case, the railroad has been operated with such reasonable precaution for the safety of others, not in fault, as is required by the maxim *Sic utere tuo ut non laedas alienum.*

On examining the evidence, as set forth in the bill of exceptions in the Circuit Court, it will be found to establish and support, beyond controvercy, the following propositions:

I.

Plaintiff, in making out his case, produced such a state of facts as raised, irrespective of any ordinance prohibiting the sounding of locomotive whistles in the city, a presumption of negligence against the defendant.

On a Sunday afternoon, November 10th, 1889, plaintiff in a single buggy joined a funeral procession, consisting of about 40 and more carriages and buggies. On their way to the cemetary they were obliged to travel over defendant's railroad track in the northeastern part of the city of Minneapolis, the public street, they travelled, crossing the track there at a sharp angle from south to north, the track also running in the same direction, but bearing somewhat west. There was at that crossing a regular flag man stationed, whose duty it was to unfurl his flag on the approach of the trains and to stop all persons attempting to cross the track when a train was approaching. When the funeral procession, coming from the south, reached the crossing, this flag man was at his post, but the flag he held in his hand was not unfurled. Says he, when testifying: "I let the funeral go; I held the flag in my hand; I did not use it; I had no right to use it; there was no danger; the road was clear; I gave no signal, except I paid my respects to the funeral." While the procession was still in the act of crossing, one of defendant's freight trains, coming from north, approached the street crossing and stopped within 30 to 125 feet thereof. It came to a stop without any whistle to release breaks. At that time, part of the funeral procession was on one side of the track and part on the other side. At that time also plaintiff, being about the middle of the procession, drove his horse up to the

crossing. He saw the engine attached to a string of cars standing but a short distance from the crossing, but he also saw the flag man there with his flag not unfurled, thereby impliedly assuring him, that there was no danger in making the crossing, and that things would, during the time, not be changed to the worse by any act of the railroad company. Plaintiff drove with his buggy, in order to get past the engine, up to a point which was almost opposite to where the engine was standing still on the track to his left, when suddenly the engine whistled twice, giving two loud sharp blasts, and at the same time the steam from the cylinder cock was allowed to escape, and when so sounded, plaintiff's horse at once took fright and ran away with the buggy so, that plaintiff was thrown out and badly injured. The engineer blew the whistle just at that critical moment, when plaintiff with his horse was nearest to the engine and when, as it may reasonably be presumed, none knew from experience and daily observation better than he, that blowing the whistle in so close proximity of horses was only too liable to scare them and cause just such accidents, as happened in this case; while plaintiff had every reason to feel safe of the whistle, and that it would not be sounded, because the city ordinance, then in force, forbade the engineer to unthrottle it at that spot.

Plaintiff's witnesses also agree substantially in saying, that there was no obstacle or anything on the track, which called for the blowing of the whistle or the opening of the cylinder cock, and that it was unnecessary to blow it at the time, plaintiff was injured.

This is the case plaintiff makes and as presented by the bill of exceptions in this cause, which, even irrespective of any ordinance on the subject, raises the presumption of negligence, that is, an absence of such precaution and prudence, as the engineer, in charge of that engine, might and ought to have observed, and as the circumstances, existing at the time, required.

And this presumption of negligence stands fixed, if not rebutted or satisfactorily excused or explained. But

II.

Instead of rebutting this presumption, defendant's servants affirm it.

The engineer knew and must have known that the crossing in front of him was a public crossing and in lawful use by plaintiff and those with him in that procession. There was *no statutory duty* that required him then and there to sound the whistle, General Laws of 1885, ch. 240, sec. 342, Minn., having expressly exempted cities and towns within the state from the operation of the general law in that respect.

It was testified that the engineer brought the train, when coming from the north, to a stop, because he saw the funeral procession confronting him, and, if he did see it and was not reckless of his duty, he must have also seen plaintiff and those following with their vehicles close to him attempting to cross, and he must also have known, that they would not have done so, had the flag man not "let them go," so that defendant's servant was in honesty and good faith bound, he controlling the motion of the engine, to afford plaintiff all reasonable facility for the purpose, until he had safely passed by the engine.

The engineer had brought the train to a stop without whistling the engine, and for the same reason *the train could have been started without using the whistle.* There was no need to whistle either "release brakes" or "set brakes."

When asked by the attorney of the railroad company (p. 23, fol. 23) whether he got from the engineer at that time the signal "brakes off," Mr. Davis, head brakeman on the train that time, answered: "You understand, we use air brakes over there; I don't know positively so, but I could absolutely swear that two thirds of them were; in running

prohibit the whistling of locomotive engines," passed an ordinance for an additional security of the traveling public, forbidding to sound any locomotive whistle at all within the limits of the city, except in certain cases therein named. It is a municipal regulation, enacted *in favorem vitae*, so much needed in a city like Minneapolis, where every railroad track is necessarily intersected, at short intervals, by a public street along which the people are entitled to travel in the ordinary mode of travel in vehicles drawn by horses, and where, as long as sounding the whistle on a locomotive engine is something, which the engineer may always do or omit, at his pleasure, without regard to time or place, said travelers will necessarily always be exposed to the danger of their horses taking fright at the sounding of the whistle. Having been duly authorized by the legislative body of the state, it has the force of law, binding upon every railroad company and its servants, while operating a locomotive engine in said city. In sounding the whistle, therefore, at the time and place it was done, the engineer acted unlawfully, was unlawfully negligent of the right of plaintiff and others, then with their teams in that funeral procession upon or near to the crossing. No unlawful act is diligence in any business, and though the unlawful blowing of the whistle in violation of an ordinance is not conclusive, it is at least evidence of negligence in a civil action brought to recover compensation for personal injuries, sustained by reason of such failure to comply with the requirement of the city ordinance.

For this reason the pleader, when framing his complaint, alleged the ordinance in question, and, at the trial, offered the same in evidence and was admitted over the captious objections of counsel for the railroad company, and was, but without any comment, referred to by the court in charging the jury. It was done, because plaintiff had a right to have it as an item of evidence considered in connection with all the other facts and circumstances in the case upon the question of defendant's prudence or negligence in sounding the

whistle at the time and place stated. In other words, the violation of the evidence was not THE, but it was certainly ONE of the facts, which rendered the act of the engineer negligent.

Hayes vs. Michigan Central R. R. Co., 111 U. S., 228
Grand Trunk Ry. Co. vs. Ives, 144 U. S., 408.

That the trial court, by giving the instruction excepted to, intended to lay down the proposition, that a violation of a city ordinance is under all circumstances negligence *per se*, and thus gave to the unlawful act of the engineer in blowing the whistle greater probative force, than indicated before and the law authorizes, — is an unwarranted assumption of counsel for the railroad company.

Immediately before giving the said instruction, the jury were expressly charged, that "your first enquiry will be, Was the defendant negligent in blowing the whistle at the time and place and under the circumstances it was blown?"

Without pausing to discuss, whether that portion of the court's charge excepted to, if it stood alone and be considered by itself, would be susceptible of any such interpretation as claimed by counsel, it is a well settled rule, that instructions are to be considered and construed together, and their meaning and effect thus determined, and not by reference to detached portions alone.

When thus construed, the said charge resolves itself into a correct statement, on the part of the court, as to what act of the engineer, in operating that engine then and there, would, under the circumstances existing at the time, be deemed negligent, viz: "If found from the evidence, that at the time and place mentioned he blew a loud blast or blasts of the locomotive whistle, and that at the time the act was done there was no imminent or immediate danger to life or property, and the whistle was not sounded as a warning of such danger."

While the language thus used may justify the inference, that the learned judge had, at the time, that part of the city

ordinance in mind, where the law contemplates that cases may occur, in which it may become necessary and the duty of those in charge of the locomotive engine, to sound the whistle as a signal of impending danger to persons and property; yet there is really nothing in it, that can properly be called even a reference to the ordinance, and still less a direction to the jury, to find from the evidence whether the ordinance was violated.

But it does not seem to us of any importance at all where those expressions really were taken from, and whether they are to be considered as stating and applying to the facts in the case the provision contained in the ordinance, or stating and applying the unwritten provision of the common law, the former being, in this respect, in full accord with the latter. In either view, the instruction states the law, applicable to the case, correctly. If the whistle was then and there sounded without need or cause—and the verdict of the jury implies it was—when the plaintiff and others, with the horses and the vehicles forming the funeral procession, were in close proximity to the engine, and thereby subjected the plaintiff and others to the danger of their horses taking fright at the steam and sound from the whistle thus blown—it was a negligent act. This would be true whether the unnecessary sounding of the locomotive whistle within the corporate limits was forbidden by a city ordinance or not. Ordinary prudence forbade it; the situation rendered it, as to plaintiff, at the time dangerous.

"*Sic utere tuout non laedas alienum*, regulates the conduct and determines the liability of corporations as of indviduals," is the language of the court, speaking through *Mr. Justice Brewer*, in *Culp vs. A. R. R. Co., 17 Kan., 475*, where, in the absence of any ordinance on the subject, it was decided to be the law, that, if an engineer needlessly blows the whistle at a depot, causing the team on the street near by to run away, the company is liable.

So in *Hill vs. Portland Railroad Co., 55 Me., 438.* In that

case the engineer was in a situation to see the plaintiff and his horse before he sounded the whistle; and, being so situate, he sounded the whistle twice, that being the usual signal for the train to stop. The court held that signals thus given, although customary, were unnecessary, and the company liable.

Reference is also made to the case of *Georgia R. R. Co. vs. Carr, 73 Ga. 557*, where the facts were similar to those in the case at bar, and where the court, through Mr. Chief Justice Jackson, says:

"If the whistle of a locomotive was unlawfully blown in approaching a public crossing or street in a city, and a horse was thereby frightened, and injury occurred, the railroad would be liable to damages."

IV.

That horses, although otherwise tractable and gentle, are liable to take fright and run away at the sudden escape of steam and the sound of the locomotive whistle in close proximity to them, is a matter of common knowledge, which the court may assume as a fact.

In the present case, the facts being all one way, and no controversy about it, and all clearly proven and admitting of no rational inference but that of disregard of duty and safety for others, *the question of negligence became, upon well settled principles, one of law, upon which the court had a right to instruct the jury, that if the engineer, without cause or need, blew the whistle under such circumstances as then existed, it was a negligent act on his part.*

Cooley on Torts, 804.

Shearman & Readfield on Negligence, sec. 56.

"It would be an idle proceeding," this court said in *N. Pa. Ry. Co., 123 U. S., 727* and *733*, "to submit the evidence to the jurymen when they could justly find only in one way."

The same rule was applied by this court in the case of *Del. Lackawana & Western Ry. Co. vs. Converse, 139 U. S.,*

469, which deserves more than a passing notice, "because," as was said by the Circuit Court of Appeals, "the rule therein given and the reasoning upon which it is based, are so closely applicable to the case at bar and so clearly sustain the action of the trial court:"

In that case plaintiff had been injured by collision between a vehicle, in which he was riding and certain freight cars, left uncontrolled otherwise than by ordinary brakes, to run in the night time over a public crossing. Upon the trial the court instructed the jury, that the facts showed that the railway company had been guilty of negligence as a matter of law, to which the defendant excepted, contending that the trial court erred in not submitting it to the jury. This court, however, upheld the ruling of the court below, Mr. *Justice* Harlan, speaking for the court, saying:

* * * * * * * * * *

"It (the trial court) was justified in so instructing the jury, because every one *knows*, and therefore, the court below *knew* that such use of the defendant's tracks, where they crossed the county road, unnecessary endangered the safety of any one, who at the time crossed the railroad tracks while traveling on that highway."

The last sentence is very apt to the case at bar. Certainly it is a matter of *common knowledge*, and hence, courts take judicial notice of that fact, that horses, although otherwise tractable and gentle, are liable to take fright and run away at the escape of steam and noise caused by the blowing of locomotive whistles in close proximity to them. It is a matter of common and ordinary experience, against which every reasonable and prudent man takes precaution, and which was the very reason that induced the city council to pass, under the authority of the legislature, that city ordinance to suppress the indiscriminate blowing of the whistle within the corporate limits, and upon the compliance therewith by defendant's servant, then in charge of the locomotive engine, plaintiff had a right to rely and govern his conduct.

There was nothing extraordinary in this horse taking fright and running away, and might reasonably have been *anticipated* by the engineer. The trial court *knew* it as well as the legislature and the city council *knew*, and every one *knows*, and no court would require evidence to inform it, nor would any one think it necessary to prove that it was an accident likely to occur under the circumstances. Certainly the time is long past where, as 30 years ago in a Maine case, *Hill* vs. *Portland Ry. Co.*, *supra*, proof of the effect, the sounding of a locomotive whistle is likely to have upon a horse otherwise tractable and gentle, was allowed by the court to be given in evidence upon the ground stated, that some of the jurors might have never heard the sound of a locomotive whistle. Hence the trial court, in the present case, was fully justified, in assuming such to be the fact without submitting it to the jury to pass on. And if the case were sent back for another trial and the question submitted as one of fact, the finding could, in our opinion, by no possibility be different as to the accident being one ordinarily likely to occur.

City of Joliet vs. Shufelt, 18 L. R. Ann., 750.

For the reasons stated, we feel confident, that this court will concur with the view of the Circuit Court of Appeals, in the opinion of that court given by *Judge* Shiras when saying: "The management of ones own property in such a way, as to cast unnecessary risk and danger upon another, is negligence. The trial court was entirely justified in instructing the jury that, if the engineer on defendant's train, when the same was standing still near the street crossing and when the vehicles, composing the funeral procession were upon the crossing or in close proximity thereto, without need or cause therefor, blew the engine whistle, he was guilty of negligence in the absence of any ordinance in force in the city of Minneapolis, the action of the court was justified and demanded by the principles of the common law and in this particular under the existing facts the pro-

visions of the city ordinance are in accord to the rule of common law."

There is, to our knowledge, no other question to be considered, that can possibly arise upon the said assignment of error we have now been discussing.

V.

Respecting the other assignments of error,—

as to which we have no knowledge, plaintiff in error may see fit to do, we may be permitted to state briefly, that there is no merit whatever in either of them.

a. The objection to the city ordinance (first assignment of error) as well as the complaint (third assignment of error) that the court erred, in not directing a verdict for the defendant, is, under the ruling of this court in the *Hayes* and the *Ives* case, *supra*, to say the least, captious, if not frivilous.

b. The instruction, embodied in the fourth assignment of error, was rightfully refused, because; 1st, not pertinent to any evidence in the case; 2nd, so far as this case is concerned, it is of no moment as to what the rule may be as to the exercise of care by defendant in sounding the whistle at any *other* time and place, than the one in issue; 3rd, the question in this case is, not whether it was *customary* to blow the whistle as was done at the time and place in the present case, but whether under the circumstances it was justifiable and prudent on the part of the railroad company; as was said by the Supreme Court in the *Hill* case,*supra*, that "the railroad company cannot adopt any rule or custom which is unreasonable or dangerous and productive of injury; the custom cannot in a given case in any degree excuse or justify the act. Every case must be determined upon its facts."

It is evident, the writ of error was taken out for delay only.

The judgment of the Circuit Court of Appeals should be affirmed with costs.

Respectfully submitted,

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